88-2012(1)

Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH L. LAMONTAGNE,

*Petitioner,*

– against –

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDGAR PAUK
LEGAL SERVICES FOR THE ELDERLY
*Attorney for Petitioner*
132 West 43rd Street
3rd Floor
New York, New York 10036
(212) 391-0120

## QUESTION PRESENTED FOR REVIEW

Whether ERISA's fiduciary standards, which became effective on January 1, 1975, apply to all denials of benefits occurring on or after that date, as held by the Third, Fourth, and Fifth Circuits, and as maintained by the United States Department of Labor; or whether their applicability depends on a case by case analysis of the "significant facts" of each denial, as held by the First, Second, Seventh, Eighth and Ninth Circuits?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 8 |
| A. The Circuit Courts Are Split Into Two Groups | 10 |
| (1) The first group of Circuits | 13 |
| (2) The second group of Circuits | 16 |
| B. The United States Department of Labor Agrees With the Second Group of Circuits | 21 |
| (1) The Structure of ERISA | 22 |
| (2) The Purpose of Section 514(b)(1) | 26 |

Page

C. The Reading by the United States Department of Labor Is the Only Correct Reading of ERISA 27

(1) The Department of Labor's reading of ERISA is supported by the canons of statutory construction 28

(2) The reading of ERISA by the first group of Circuits leads to anomalous results 30

(3) The Department of Labor's reading, unlike that of the first group of Circuits, is consistent with ERISA's intent to extend its protections to all employees as soon as practicable 33

CONCLUSION 37

Page

APPENDIX A

Opinion of the Court of Appeals for the Second Circuit A-1

APPENDIX B

Opinion of the United States District Court for the Southern District of New York A-34

APPENDIX C

Order of the Court of Appeals for the Second Circuit Denying Petition For Rehearing A-40

APPENDIX D

Relevant Statutory Provisions A-42

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **United States Authorities** | |
| Employee Retirement Income Security Act of 1974, as amended ("ERISA") | Passim |
| ERISA § 2(b), 29 U.S.C. § 1001(b) | 22, 23 |
| 102(a)(1), 29 U.S.C. § 1022(a)(1) | 5 |
| 108, 29 U.S.C. § 1028 | 25, 26 |
| 111, 29 U.S.C. § 1031 | 31 |
| 203(b)(1)(F), 29 U.S.C. § 1053(b)(1)(F) | 32 |
| 211, 29 U.S.C. § 1061 | 31 |
| 211(a), 29 U.S.C. § 1061(a) | 31 |
| 211(b)(1), 29 U.S.C. § 1061(b)(1) | 31 |
| 211(b)(2), 29 U.S.C. § 1061(b)(2) | 31 |
| 211(c)(1), 29 U.S.C. § 1061(c)(1) | 31 |
| 211(d), 89 U.S.C. § 1061(d) | 31 |
| 306, 29 U.S.C. § 1086 | 31 |
| 306(a), 29 U.S.C. § 1086(a) | 31 |

| | Page |
|---|---|
| 306(b), 29 U.S.C. § 1086(b) | 31 |
| 306(c)(1), 29 U.S.C. § 1086(c)(1) | 31 |
| 306(d), 29 U.S.C. § 1086(d) | 31 |
| 306(e), 29 U.S.C. § 1086(e) | 31 |
| 404(a), 29 U.S.C. § 1104(a) | 5 |
| 405, 29 U.S.C. 1105 | 26 |
| 405(a)(1), 29 U.S.C. § 1105(a)(1) | 24 |
| 405(b)(1)(B), 29 U.S.C. § 1105(b)(1)(B) | 24 |
| 405(b)(3)(A), 29 U.S.C. § 1105(b)(3)(A) | 24 |
| 405(c)(2), 29 U.S.C. § 1105(c)(2) | 24 |
| 405(d)(1), 29 U.S.C. § 1105(d)(1) | 24 |
| 410, 29 U.S.C. § 1110 | 26 |
| 410(b)(1), 29 U.S.C. § 1110(b)(1) | 24 |
| 501, 29 U.S.C. § 1131 | 29 |
| 502, 29 U.S.C. § 1132 | 29 |

| | Page |
|---|---|
| 502(a), 29 U.S.C. § 1132(a) | 23 |
| 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) | 35 |
| 503, 29 U.S.C. § 1133 | 6 |
| 504, 29 U.S.C. § 1134 | 29 |
| 510, 29 U.S.C. § 1140 | 29 |
| 511, 29 U.S.C. § 1141 | 29 |
| 514(a), 29 U.S.C. § 1144(a) | 10 |
| 514(b), 29 U.S.C. § 1144(b) | 11, 24, 27 |
| 514(b)(1), 29 U.S.C. § 1144(b)(1) | 8, 24, 26, 28 |
| 29 C.F.R. § 2520.102-3 | 5 |
| 2560.503-1(f) | 6 |
| 2560.503-1(f)(3) | 6 |

Page

Cases

Azzaro v. Harnett, 414 F.Supp. 473 (SDNY 1976), aff'd, 553 F.2d 93 (2d Cir. 1977), cert. den., 434 U.S. 824 (1977) 19

Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987, cert. den., ____ U.S. ____, 108 S.Ct. 229 (1987) 25

Chevron U.S.A. v. Natural Res. Det. Council, 467 U.S. 837 (1984) 27

Cowan v. Keystone Emp. Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978) 13

Coward v. Colgate-Palmolive Co., 686 F.2d 1230 (7th Cir. 1982), cert. den., 460 U.S. 1070 (1983) 14, 15

Davis v. Michigan Dept. of Treasury, ____ U.S. ____, 103 L.Ed.2d 891 (1989) 28

Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989) 17, 19, 30, 33

LaMontagne v. United Wire, Metal & Mach. Pension Fund, 869 F.2d 153 (2d Cir. 1989) 13, 16

Landro v. Glendenning Motorways, 625 F.2d 1344 (8th Cir. 1980) 14, 16, 34

| | Page |
|---|---|
| Lee v. Garrett, 803 F.2d 1082 (9th Cir. 1986) | 14, 15, 34 |
| Massa. Mut. Life Ins. v. Russell, 473 U.S. 134 (1985) | 6 |
| Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984) | 14, 15, 33, 34 |
| Quinn v. Country Club Soda Co., 639 F.2d 838 (1st Cir. 1981) | 13, 15, 34 |
| Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir. 1989) | 17, 20 |
| Smith v. Retirement Fund Trust, 857 F.2d 587 (9th Cir. 1988) | 14, 15 |
| Tanzillo v. Local Union 617, I. B. of T., 769 F.2d 140 (3rd Cir. 1985) | 16, 17, 20 |
| Winer v. Edison Bros. Stores, Pension Plan, 593 F.2d 307 (8th Cir. 1979) | 12, 13, 14, 16, 34, 35 |
| Wolfe v. J.C. Penney Co., 710 F.2d 388 (7th Cir. 1983) | 6 |
| Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966 (5th Cir. 1981) | 16, 18, 19, 29, 34 |

Page

Other Authorities

Brief of Ray Marshall, Secretary of the United States Department of Labor, Plaintiff-Appellee, in Marshall v. Edison Brothers, reported as Winer v. Edison Bros., supra. 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

----------x

JOSEPH L. LAMONTAGNE,

Petitioner,

- against -

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Respondents.

----------x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph L. Lamontagne prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on February 27, 1989.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit dated February 24, 1989, reported at 869 F.2d 153, is set forth at Appendix A herein. The opinion of the District Court for the Southern District of New York, dated July 7, 1988, is not officially reported, and is set forth at Appendix B herein.

## JURISDICTION

The order of the Court of Appeals for the Second Circuit was dated and entered on February 27, 1989. Petitioner filed a timely motion for rehearing, which was denied on March 17, 1989, in an order set forth at Appendix C herein. This petition for a writ of certiorari was filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional provisions invoked in this petition. The federal statutory provision involved is the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The relevant texts of that statute are set forth at Appendix D herein.

## STATEMENT OF THE CASE

Petitioner became a participant in respondent multi-employer pension plan in 1954. In late 1971 he became injured on the job and permanently disabled from performing covered employment.

In November 1986, at age 66, petitioner applied to respondents for a "reduced pension," which required the attainment of age 65. He also applied for a "grace period" to bridge a "break in service" that occurred on December 31, 1974, seventeen

days before his attainment of age 55, when his right to a pension would have vested under the terms of the plan.*

By a letter dated December 3, 1986, however, respondents refused to consider petitioner's application, on the ground that their prior denial of a disability pension in 1978 "was determinative of all pensions that Mr. Lamontagne was, or could

---

*Pursuant to the Plan, a participant's pension credits were cancelled if he suffered a "break in service" before age 55. The occurrence of the "break," however, could be delayed for up to two years if the failure to work was due to disability. Such delay was referred to as a "grace period." When "extenuating circumstances" were present, as detailed in petitioner's 1986 pension application, there was no deadline for the award of the "grace period." Petitioner needed a "grace period" of only 17 days for his right to a pension to vest. The Second Circuit, however, never reached the merits of his claim that respondents' refusal to award a "grace period" breached ERISA's fiduciary standards, because the Court held those standards inapplicable.

have been, eligible for."*

Petitioner filed this suit on January 6, 1987, claiming that respondents' December 3, 1986 denial of a pension violated, inter alia, ERISA's fiduciary standards set forth at Section 404(a) of ERISA, 29 U.S.C.

---

*On April 13, 1978, at age 58, petitioner had applied for a disability pension. By letter dated November 14, 1978 he was informed that his application was denied, but was given no reason for the denial of a disability pension. Instead, the letter explained that he was not eligible for an early retirement pension, for which he had not applied, due to a "break in service of 5 years." The letter did not inform petitioner, however, that, due to his disability, he was entitled to apply for a "grace period." The Summary Plan Description also failed to describe the "grace period," contrary to the requirement of Section 102(a)(1) of ERISA, 29 U.S.C. § 1022(a)(1), and 29 C.F.R. § 2520.102-3. Consequently, petitioner, who was unrepresented and did not know about the "grace period," took no further action until, after consulting counsel in 1986, he filed an application for a "reduced" pension and applied for a "grace period." A "reduced pension," unlike an "early retirement pension," which is payable on or after age 55, is payable at age 65, and, therefore, is not actuarially reduced.

§ 1104(a).*

---

*It is petitioner's claim that respondents' 1986 denial of a "reduced pension" breached ERISA's fiduciary standards, for three reasons. First, the 1978 denial letter, on which the 1986 decision was based, failed to comply with ERISA's claim denial procedure, and thus violated ERISA's fiduciary standards. Massa. Mut. Life Ins. v. Russell, 473 U.S. 134 (1985) at 153 (Brennan, J., concurring). That procedure, set forth at Section 503 of ERISA, 29 U.S.C. § 1133, is further detailed at 29 C.F.R. § 2560.503-1(f). It provides, in relevant part, that, upon denying a claim, a plan administrator must provide to a claimant "[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." 29 C.F.R. § 2560.503-1(f)(3). In failing to inform petitioner that, due to his disability, he was entitled to a "grace period," respondents violated that regulation. See, e.g., Wolfe v. J.C. Penney Co., 710 F.2d 388, 392 (7th Cir. 1983) ("Describing additional information needed and explaining its relevance, as required by subsection (3) of 29 C.F.R. § 2560.503-1[f], enables a participant ... to gain a meaningful review by knowing with what to supplement the record.") Because the 1978 denial letter violated ERISA, it was ineffective, and could not justify respondents' denial of petitioner's 1986 application for a "reduced pension." Second, respondents also violated ERISA's

(Footnote continued on following page.)

On the respondents' motion to dismiss the complaint and for summary judgment, the District Court dismissed the complaint, holding that ERISA's fiduciary standards did not apply to petitioner's claim. On appeal, the Second Circuit affirmed. It identified the issue to be "whether the alleged act or omission central to Lamontagne's fiduciary standards claim occurred before January 1, 1975." (A-5)* It then held that the "central act" was "the Fund's adoption of the break in

---

(Footnote Cont'd)

fiduciary standards by refusing to entertain petitioner's 1986 application for a "grace period," even though such application had never been made before. Third, although petitioner had never before applied, or been eligible to apply, for a "reduced pension," respondents stated that their 1978 denial of a disability pension to petitioner "was determinative of all pensions that Mr. Lamontagne was, or could have been, eligible for."

*All references to (A- ) are to the Appendix to this petition.

employment policy." (A-6)

Consequently, the Court, relying on Section 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1), held that ERISA's fiduciary standards were not applicable to respondents' December 3, 1986 pension denial, and affirmed the dismissal of that claim.

## REASONS FOR GRANTING THE WRIT

The writ should be granted in order to resolve a clear conflict between two groups of Circuits, on the important issue of the application of ERISA's fiduciary standards.

In this action the Second Circuit has aligned itself with the First, Seventh, Eighth, and Ninth in holding that, where the "alleged act or omission central to ... [the] fiduciary standards claim occurred before January 1, 1975" (A-5), the denial is not reviewable pursuant to ERISA's

fiduciary standards, even though the denial itself occurred on or after January 1, 1975.

By contrast, the Third, Fourth and Fifth Circuits have held, and the United States Department of Labor has maintained, that a denial of benefits is always reviewable under ERISA's fiduciary standards when the denial occurs on or after January 1, 1975.

The irreconcilable approaches taken by the two groups of Circuits would cause petitioner's claim to have different outcomes, depending on the Circuit Court considering it, thus encouraging forum shopping. It is exactly this type of conflict among the Circuits that requires this Court to assume jurisdiction over this petition and establish the correct reading of the statute in question.

### A. The Circuit Courts Are Split Into Two Groups

The eight Circuit Courts that have had occasion to rule on the applicability of ERISA's fiduciary standards to a denial of benefits occurring on or after January 1, 1975, have focused their analyses on whether the "act or omission" central to the alleged fiduciary breach occurred before, or on or after January 1, 1975.

The reference to "act or omission" is found in Section 514 of ERISA, 29 U.S.C. § 1144, which provides, in relevant part:

> Other Laws
>
> Supersedure; effective date
>
> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter... shall supersede any and all

> State laws insofar as they may now or hereafter relate to any employee benefit plan ... This section shall take effect on January 1, 1975.
>
> Construction and application
>
> (b) This section shall not apply with respect to any action which arose, or any act or omission which occurred, before January 1, 1975.

All Circuits that have considered the question have agreed that, before ERISA's fiduciary standards can be held applicable, a double inquiry is necessary, to determine both whether "any action ... arose, or any act or omission ... occurred, before January 1, 1975."

Because all Circuits have held that an action "arises" pursuant to ERISA upon the denial of a pension application, ERISA's fiduciary standards have been held inap-

plicable where such denial takes place before January 1, 1975. When the denial takes place on or after January 1, 1975, however, the Circuit Courts have split as to whether those standards should be applicable to all such denials. The split is based on differing interpretations of "act or omission."

It is conceded by all Circuits, as stated by the Eighth, that "[t]he legislative history behind the phrase 'act or omission' is sparse." Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307, 313 (8th Cir. 1979), and that, therefore, "'it is not at all clear what acts and omissions Congress referred to in § 514(b)(1) ... '", id., quoting from Bacon v. Wong, 445 F.Supp. 1189, 1192 (N.D. Cal. 1978).

As a consequence, the Circuits have split into two groups with irreconcilable

interpretations.

(1) The first group of Circuits

The first group has interpreted "act or omission" to refer to "those significant facts which give rise to a claim but which fall short of establishing a cause of action." Winer, supra, 593 F.2d at 313. Under this approach, the courts must examine the "significant facts" of each claim (also referred to as the "central" or "critical" acts) to determine, on a case by case basis, whether ERISA's fiduciary standards are applicable. The Circuits that have adopted this approach are the First, Second, Seventh, Eighth and Ninth. See: Cowan v. Keystone Emp. Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978) ("Cowan"); Quinn v. Country Club Soda Co., 639 F.2d 838 (1st Cir. 1981) ("Quinn"); Lamontagne v. United Wire, Metal & Mach. Pension Fund,

869 F.2d 153 (2nd Cir. 1989) ("Lamontagne"); Coward v. Colgate-Palmolive Co., 686 F.2d 1230 (7th Cir. 1982), cert. den., 460 U.S. 1070 (1983) ("Coward"); Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979) ("Winer"); Landro v. Glendenning Motorways, 625 F.2d 1344 (8th Cir. 1980) ("Landro"); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984) ("Menhorn"); Lee v. Garrett, 803 F.2d 1082 (9th Cir. 1986); Smith v. Retirement Fund Trust, 857 F.2d 587 (9th Cir. 1988).*

---

*Even among the first group of Circuits, however, there is no agreement on whether a pre-1975 break-in-service, rather than the post-1975 denial of benefits based on that break, is the "significant fact." In Coward, supra, the Seventh Circuit held that a class of plaintiffs who had suffered a pre-1975 break in service due to layoff, could rely on ERISA's fiduciary standards in challenging a 1976 pension denial. The Seventh Circuit rejected the defendant's argument that the "critical 'act' for purposes of ERISA, 29 U.S.C. § 1144, was the

(Footnote continued on following page.)

Where, as a result of an examination of the "significant facts," courts in this group conclude that ERISA's fiduciary standards are not applicable to the claim, they are further sub-divided in two sub-groups. The first sub-group will dismiss the action for want of federal jurisdiction. To this sub-group belong the First Circuit (Cowan, Quinn, supra), the Seventh (Coward, supra), and the Ninth (Menhorn, Lee, Smith, supra).

The second sub-group, holding it has jurisdiction to apply State law, will pro-

---

(Footnote Cont'd)

employees' termination from the plan as a result of their extended layoffs." Coward, 686 F.2d at 1234. It held, instead, that the "critical act ... was the denial of plaintiff's application for pension benefit credits..." Id. That decision is indistinguishable from the decision in the case at bar, where, pursuant to Coward, the Plan's 1986 denial of benefits would be the "critical act," not the pre-1975 break in service.

ceed to adjudicate the claim. The Circuits adhering to this holding are the Second (Lamontagne, supra),* and the Eighth (Winer, supra, and Landro, supra).

(2) The second group of Circuits

The second group of Circuits has focused, instead, on the date of denial of benefits, holding that all denials of pension benefits on or after January 1, 1975 are subject to ERISA's fiduciary standards. Tanzillo v. Local Union 617, I.B. of T., 769 F.2d 140 (3rd Cir. 1985) ("Tanzillo"). The Circuits so holding, in addition to the Third, are the Fourth and the Fifth. See: Woodfork v. Marine Cooks

---

*In the action at bar, however, the Lamontagne court, after it found ERISA's fiduciary standards inapplicable, inexplicably did not proceed to apply State law.

& Stewards Union, 642 F.2d 966 (5th Cir. 1981) ("Woodfork"); Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989) ("Degan"); Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir. 1989) ("Rodriguez").

This second group of Circuits has emphatically disavowed the approach taken by the first group, and, even where one of its holdings could be distinguished on its facts, has flatly refused to do so. See, e.g., Tanzillo, supra, at 144, n.3 ("we prefer to disavow Menhorn rather than to rely on its distinguishing characteristics.")

This second group of Circuits has arrived at its holding by two different routes, and is, therefore, subdivided in two subgroups. The first subgroup, composed of the Fifth Circuit, has reasoned that, given the lack of guidance from

Congress, it "must therefore divine specific statutory meaning from general statements of Congressional intent and the rules of statutory construction." Woodfork, supra, 642 F.2d at 970. The Court then held:

> A basic principle of statutory construction is that "a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." [Citations omitted] ... [A]ny cause of action arising before 1975, by definition, must be based on acts or omissions occurring before 1975. Thus, the cause-of-action exception would have independent significance only if it applies in contexts to which the act-or-omission exception is inapplicable.

Woodfork, supra, 642 F.2d at 970-971.

The Fifth Circuit, therefore, has limited the use of the "act or omission" exception to "acts or omissions that set in motion legal proceedings other than causes

of action." Id., at p. 971.

Examples of such proceedings preempted by ERISA are "pension-related state administrative proceedings and criminal prosecutions, which certainly cannot be characterized as causes of action." Woodfork, supra, at 971, citing as an example of such proceedings Azzaro v. Harnett, 414 F.Supp. 473 (SDNY 1976), aff'd, 553 F.2d 93 (2d Cir. 1977), cert. den., 434 U.S. 824 (1977). Woodfork's holding and rationale were reaffirmed very recently in Degan, supra. Consequently, in the Fifth Circuit the "act or omission" test is relevant only for civil or criminal proceedings brought by State authorities under State law.

The second sub-group, composed of the Third and Fourth Circuits, has interpreted "act or omission" to mean the grant or

denial of pension benefits.

> While the determination of a claim upon the Fund may require the Fund trustees to consider events that have taken place before ERISA's enactment, the act of granting or denying a pension nevertheless involves a contemporaneous construction of the plan's provisions - an "act or omission" to which ERISA's fiduciary standards apply, and, by extension, over which the district courts are unquestionably given jurisdiction.

Tanzillo, supra, 769 F.2d at 144; Rodriguez, supra.

Although by two different routes, all Circuit Courts in the second group agree that, where a denial of benefits occurs on or after January 1, 1975, the denial is reviewable pursuant to the fiduciary standards of ERISA. As will be discussed below, the United States Department of Labor agrees with this second group of

Circuits.

### B. The United States Department of Labor Agrees With the Second Group of Circuits

In its brief before the Eighth Circuit in Winer, supra, the United States Department of Labor took the position taken by the second group of Circuits, namely the Third, Fourth, and Fifth, that the applicability of ERISA's fiduciary standards depended exclusively upon the date of benefit denial. It reached that conclusion by a still different route, however, because it maintained that the phrase "act or omission" was never intended by Congress to apply to the conduct of participants or beneficiaries, but only to the conduct of fiduciaries.

The Department found support for its conclusion in the overall structure of ERISA, and in the purpose of Section

514(b). Brief of Ray Marshall, Secretary of the United States Department of Labor, Plaintiff-Appellee, at 32-35, in Marshall v. Edison Bros. Stores Pension Plan, reported as Winer, supra, (No. 78-1328). The Secretary's interpretation is set forth below.

(1) The Structure of ERISA

As stated by the Department of Labor, "[a] central purpose of ERISA is to regulate fiduciary conduct in order to protect the rights of plan participants." Id., at p. 32. Subsection 2(b) of ERISA, 29 U.S.C. § 1001(b), states that the

> policy of this Act [is] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appro-

priate remedies, sanctions, and ready access to the Federal courts.

Part 4 of Subchapter I, entitled "Fiduciary Responsibility," sets forth the "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," as described above in § 2(b). Nowhere in the statute is there any part setting forth "participant responsibility" provisions. Part 5 of Subchapter I -- "Administration and Enforcement" -- provides for ERISA § 2(b)'s "appropriate remedies, sanctions and ready access to the Federal Courts," so that participants, beneficiaries, the Secretary, and fiduciaries (suing their co-fiduciaries) may enforce the substantive duties imposed by the Act on fiduciaries. See, ERISA § 502(a), 29 U.S.C. § 1132(a).

In keeping with the statute's regu-

lation of fiduciary conduct, Congress throughout the fiduciary responsibility provisions used the phrase "acts or omissions" to refer to fiduciary breaches. For example, § 405(a)(1), 29 U.S.C. § 1105(a)(1), provides that a fiduciary shall be liable for a breach of fiduciary responsibility of another fiduciary,

> if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; ... (emphasis added)

Similarly, in §§ 405(b)(1)(B), 405(b)(3)(A), 405(c)(2), 405(d)(1), and 410(b)(1), 29 U.S.C. §§ 1105(b)(1)(B), (b)(3)(A), (c)(2), (d)(1), and 1110(b)(1), the phrase "acts or omissions" refers consistently and exclusively to fiduciary conduct. Other than these sections and Section 514(b)(1), the term "acts or omissions" appears nowhere

else in Subchapter I, except in Section 108, 29 U.S.C. § 1028 of Part 1 which also regulates the reporting and disclosure requirements of fiduciaries. That particular section, although not contained in Part 4, which regulates the conduct of fiduciaries, is entitled "Reliance [by fiduciaries] on administrative interpretations."

An established maxim of statutory construction provides that where the same phrase is used in different parts of a statute, it is presumed, absent any clear indication to the contrary, that the phrase be used in the same sense throughout; and where the meaning of the phrase is clear in one instance, the same meaning will be given to it elsewhere in the statute. Barnson v. U.S., 816 F.2d 549, 554 (10th Cir. 1987), cert. den., ____ U.S. ____, 108 S.Ct. 229 (1987). That principle applied

here requires the conclusion that Congress, having used the phrase "acts or omissions" to refer only to fiduciary conduct in §§ 405, 410 and 108, must have intended that the same term be applied in the same sense in § 514(b)(1).

(2) The Purpose of Section 514(b)(1)

Applying the phrase "acts or omissions" to fiduciary, not participant conduct, also makes sense in light of the purpose of § 514(b)(1). The essential purpose of the § 514(b)(1) effective date is to prevent the pre-ERISA conduct of defendants from being judged according to post-ERISA standards. Because Subchapter I of ERISA does not regulate the conduct of participants, the purposes of Subchapter I and the protections afforded by § 514(b)(1) are not advanced if the term "acts or omissions"

in § 514(b)(1) is applied to such conduct. On the other hand, ERISA does regulate fiduciary conduct, and therefore § 514(b) can be sensibly applied to prevent application of new statutory obligations on "acts or omissions" of fiduciaries occurring prior to the statute's effective date.

### C. The Reading by the United States Department of Labor Is the Only Correct Reading of ERISA

Quite apart from the deference due a reading of a statute by the agency entrusted with its administration, see, e.g., Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-845 (1984), the Department of Labor's reading is correct because, (1), it is required by the canons of statutory construction; (2) because a contrary reading would lead to

anomalous results; and (3), only the Department's reading is consistent with ERISA's purpose.

(1) The Department of Labor's reading of ERISA is supported by the canons of statutory construction

As this Court has admonished, "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dept. of Treasury, ____ U.S. ____, 103 L.Ed.2d 891, 901 (1989).

The meaning of "act or omission" is best understood, therefore, when it is read in pari materia with the provisions of Part 5 of Subchapter I of ERISA, where § 514 (b)(1) is found. Entitled "Administration

and Enforcement," that Part, as its name implies, provides not only access to the federal courts for participants and beneficiaries whose causes of action "arise," but also for civil and criminal proceedings to be brought by the Secretary of Labor.* As noted by the Woodfork court, such proceedings are set in motion by an "act or omission," and "cannot be characterized as causes of action." Woodfork, supra, 642 F.2d at 971.

Furthermore, as pointed out in Woodfork, and reiterated in Degan, under the Second Circuit's interpretation, "it

---

*See, e.g., Section 501, 29 U.S.C. § 1131 ("Criminal Penalties"); Section 502, 29 U.S.C. § 1132, ("Civil enforcement", several subsections of which provide for civil enforcement by the Secretary of Labor); Section 504, 29 U.S.C. § 1134 ("Investigative authority"); Section 510, 29 U.S.C. § 1140 ("Interference with protected rights"); Section 511, 29 U.S.C. § 1141 ("Coercive interference").

would not matter when the cause of action arose so long as the relevant acts or omissions occurred prior to 1975." Degan, 869 F.2d at 894. Consequently, such interpretation "would render the first clause of section 1144(b)(1) superfluous," id., a result that runs counter to the most fundamental canon of statutory construction.

(2) The reading of ERISA by the first group of Circuits leads to anomalous results.

Unless the reference to "act or omission" is to the conduct of fiduciaries (whose duties are set forth at Part 4 of Subchapter I), there is no principled way to apply those words only to Part 4. If they are applied to Part 1 ("Reporting and Disclosure"), Part 2 ("Participation and Vesting"), and Part 3 ("Funding") of the same Subchapter, they would lead to

anomalous results. This is so because each of those Parts, in addition to containing one or more effective dates,* also contains very carefully calibrated "applicability" provisions, specifically geared to each part.** To superimpose the "act or omission" test would create the anomalous situation of specific, targeted provisions being modified, in blunderbuss fashion, by a general one, leading to great uncertainty as to the applicability of any of ERISA's regulatory provisions contained in Subchapter I. An example will best illustrate

---

*The "effective date" of Part 1 is contained in Section 111, 29 U.S.C. § 1031; that of Part 2 is contained in Section 211, 29 U.S.C. § 1061; and that of Part 3 is contained in Section 306, 29 U.S.C. § 1086.

**See, e.g., Section 211(a), (b)(1), (2), (c)(1), (d), 29 U.S.C. § 1061(a), (b)(1), (2), (c)(1), (d), of Part 2; and Section 306(a), (b), (c)(1), (d) and (e), 29 U.S.C. § 1086(a), (b), (c)(1), (d) and (e), of Part 3.

that that was not Congress' intent.

Section 203(b)(1)(F), 29 U.S.C. § 1053(b)(1)(F), of Part 2 provides that, in computing the period of service under the plan for purposes of determining vesting, fiduciaries acting after the effective date of Part 2, may compute a participant's years of credited service on the basis of plan rules which were in effect when such service or breaks in service occurred.

Congress, therefore, evidently made a choice as to which pre-ERISA plans provisions were authorized to be imposed by fiduciaries after ERISA's effective date - and did so explicitly by specifying them. Other provisions were not so authorized, not so specified, and therefore must conform to ERISA standards.

(3) The Department of Labor's reading, unlike that of the first group of Circuits, is consistent with ERISA's intent to extend its protections to all employees as soon as practicable

As pointed out by the Degan court,

> the preemptive provisions of ERISA are "deliberately expansive, and designed to 'establish pension plan regulations as exclusively a federal concern.'" Pilot Life [v. Dedeaux], 481 U.S. [41,] at 46, 107 S.Ct. at 1552 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981)). A logical corollary to this maxim is that the statutory exceptions to ERISA's preemptive reach should be construed narrowly.

Degan, supra, 869 F.2d at 894, note 7.

The Second Circuit's reading of the exception to the supersedure provision, however, is very broad, because it renders ERISA's fiduciary standards inapplicable to all pension denials, regardless of their

date, as long as the "significant" "act or omission" occurred before January 1, 1975. Based on this theory, it does not matter when a pension applicant is last employed. In Lee, in fact, the plaintiff's employment did not terminate until March 1984; in Menhorn, until June 1980; in Quinn, until November 1976; in Winer, until May 1976; in Landro, until 1977.

Yet, that indifference to the actual date of retirement and to the date of the benefit denial, is "inimical to the Congressional attempt to extend the protections of ERISA to all employees as soon as practicable." Winer, supra, 593 F.2d at 313.

The result of the Second Circuit's reading of the exception to ERISA's supersedure provisions is to postpone indefinitely the applicability of ERISA's fidu-

ciary and other standards. There is nothing in either the language or legislative history of ERISA that lends any support to such indefinite postponement.*

- - - - - - - - - - - -

In sum, the conclusion is inescapable that the correct reading of "act or omission" is the one provided by the United States Department of Labor, to the effect that those words refer only to acts or

---

(Footnote Cont'd)

*See also: Menhorn, supra, 738 F.2d at 1507, where the dissenter noted: "Presumably, had Menhorn's employment not terminated, the majority approach would also deny Menhorn his right to a federal forum to clarify his rights under Firestone's pension plan if the clarification he sought was what effect his 1967 break-in-service would have on his pension rights. Such a construction is at odds with ERISA's express provision of a federal forum to clarify a participant's right to future pension benefits. See 29 U.S.C. § 1132(a)(1)(B)."

omissions of fiduciaries.

Thus, the only pension denials to which ERISA's fiduciary standards are not applicable are those which occurred before January 1, 1975. Because petitioner was denied a "reduced pension" in 1986, the fiduciary standards of ERISA are applicable to review that denial, contrary to the holding of the Second Circuit, and of the other Circuits in the first group, namely the First, Seventh, Eighth and Ninth.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: June 7, 1989

Respectfully submitted,

EDGAR PAUK
LEGAL SERVICES FOR
THE ELDERLY
132 West 43rd Street,
3rd Floor
New York, N.Y. 10036
(212) 391-0120

Attorney for Petitioner

# APPENDIX

APPENDIX A Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 510—August Term, 1988

(Argued: December 15, 1988

Decided: February 24, 1989)

Docket No. 88-7703

JOSEPH L. LAMONTAGNE,

*Plaintiff-Appellant*,

—v—

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

*Defendants-Appellees*.

Before:

MESKILL, PIERCE and MINER,

*Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Mary Johnson Lowe, *J.*) which dismissed appellant's complaint on

the grounds (1) that the district court lacked subject matter jurisdiction over appellant's ERISA claims and (2) that appellant's Taft-Hartley claim was time-barred.

Affirmed.

---

EDGAR PAUK, ESQ., New York, N.Y. (Legal Services for the Elderly, New York, N.Y.), *for Plaintiff-Appellant.*

ARTHUR N. LAMBERT, ESQ., New York, N.Y. (Brian M. Levy, Susan E. Jaffee, Lambert & Weiss, New York, N.Y., of counsel), *for Defendants-Appellees.*

---

PIERCE, *Circuit Judge*:

Joseph L. Lamontagne appeals from a judgment of the United States District Court for the Southern District of New York, Judge Mary Johnson Lowe, which dismissed his complaint on the grounds (1) that the district court lacked subject matter jurisdiction over his Employee Retirement Income Security Act ("ERISA") claims and (2) that his Taft-Hartley Act claim was time-barred. We affirm.

## BACKGROUND

The Pension Plan ("the Plan") of the United Wire, Metal & Machine Pension Fund ("the Fund"), as amended through 1970, in Article I, § 7, defines "Covered Employment" as employment in which the employee

earns credit towards a pension to be supplied by the Fund. Lamontagne worked in covered employment as a machinist from 1954 to 1971. On September 7, 1971, when he aggravated a back injury, Lamontagne left his job and never again returned to covered employment.

According to Article III, § 5(b) of the Plan, an employee's failure to work at least 800 hours in covered employment within a period of two consecutive calender years, termed a "break in employment," results in the cancellation of the employee's previously earned pension credit. Section 5(c) provides for an exception to the break in employment policy; it states that an absence from covered employment shall *not* be considered a break in employment if the employee is absent from work due to a total disability and the trustees of the Fund grant the employee's application to have the period of his absence recognized as a "grace period."

The Fund offers four types of pensions: Normal, Early Retirement, Reduced and Disability. *See* Article II. As set forth in Article II of the Plan, an employee must have accumulated pension credit for at least fifteen years to be eligible for any one of these pensions.

More than six years after leaving his job, on April 19, 1978, Lamontagne applied to the Fund for a Disability Pension. In a letter to Lamontagne dated November 14, 1978, the Fund's administrator responded; he wrote:

> On Monday, November 6, 1978, the Board of Trustees of the United Wire, Metal and Machine Pension Fund denied your application for pension benefits for failure to meet the requirements for either a Disability or Partial Pension from the Fund.

> . . . [A]t the time of your termination you were 52 years of age. To be eligible for an Early Retirement Pension then you had to be 55 years of age. Therefore todate [sic] you had incurred a break in service of 5 years since you failed to work at least 800 hours in covered employment within any period of two consecutive calendar years. See page 11 of the enclosed pension book.

Eight years later, on or about November 7, 1986, Lamontagne again applied for a pension from the Fund. This time the type of pension for which he applied was a Reduced Pension. Again, the Fund denied Lamontagne's application. In a letter to Lamontagne dated December 3, 1986, the Fund's attorney wrote that the Fund's trustees "declined the reconsideration of their determination of 1978 which found that a break-in-service occurred."

Following the denial of his second application for a pension, Lamontagne commenced this suit against the Fund in the United States District Court for the Southern District of New York. In a complaint dated January 6, 1987, Lamontagne alleged that the Fund denied him a pension in violation of ERISA, 29 U.S.C. § 1104(a) (1982) ("fiduciary standards claim" and 29 U.S.C. § 1053 (Supp. IV 1986) ("vesting standards claim"); in violation of the terms of the Plan ("Plan violation claim"); and in violation of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5) (1982) ("Taft-Hartley claim"). In a judgment dated July 19, 1988, pursuant to the Fund's motion to dismiss the ERISA claims for lack of subject matter jurisdiction and the Fund's motion for summary judgment on the Taft-Hartley claim based on the statute of limitations, the district court dismissed the complaint. In her memorandum opinion and order, Judge Lowe held that the court

lacked subject matter jurisdiction over Lamontagne's ERISA claims and that Lamontagne's Taft-Hartley claim was time-barred. While Judge Lowe did not explicitly discuss Lamontagne's Plan violation claim, she alluded to it and effectively dismissed it in a footnote. This footnote read: "Because plaintiff never had a vested right to a pension under either a pre-ERISA or ERISA plan, the Court need not consider . . . those cases which hold that ERISA provides a federal forum for wrongful termination of benefits which vested prior to ERISA's effective date."

## DISCUSSION

### A. *Fiduciary Standards Claim*

Title 29 U.S.C. § 1144(b)(1) (1982) provides that the fiduciary standards section of ERISA "shall not apply with respect to any cause of action which arose, or *any act or omission* which occurred, before January 1, 1975." (Emphasis added.) The issue here, which the district court decided in the affirmative, is whether the alleged act or omission central to Lamontagne's fiduciary standards claim occurred before January 1, 1975.

In *Baum v. Nolan*, 853 F.2d 1071 (2d Cir. 1988), this court affirmed the district court's dismissal of a suit by participants in a Teamsters pension fund. These participants claimed that the trustees of the fund in 1973 breached their fiduciary duty under ERISA by entering into an agreement to merge the Teamsters pension fund with a pension fund for brewery workers without making adequate inquiry into the financial soundness of the brewery workers' fund. Further, they alleged that the trustees continued to breach their fiduciary duty after 1975 by using Teamsters fund assets to pay benefits to brewery

workers. *Id.* at 1074-75. The court held that under § 1144(b)(1), ERISA did not apply to the participants' cause of action, since the merger agreement and the trustees' alleged failure to inquire about the financial soundness of the brewery workers' fund occurred before January 1, 1975. *Id.* at 1075. The fact that the merger "generate[d] consequences after ERISA's effective date," namely, the post-1975 payments to brewery workers, did not make the merger actionable under ERISA. *Id.*

In *Baum*, the court identified the act and omission which were central to the case, and those events which were merely the consequence of the act and omission, and held that only the former were relevant for § 1144(b)(1) purposes. Here, as Judge Lowe found, the act central to Lamontagne's case was the Plan's pre-1975 adoption of the break in employment policy. This policy required the Fund to deny Lamontagne's pension application in 1978, since Lamontagne had failed to obtain covered employment at any time after September 1971. Given Lamontagne's employment history, the 1978 denial of his pension application was merely a consequence of the Fund's adoption of the break in employment policy. The relevant act for § 1144(b)(1) purposes—the Fund's adoption of the break in employment policy—occurred before 1975. Therefore, the fiduciary standards section of ERISA does not apply to Lamontagne's claim and the ruling by the district court in dismissing it was correct.

*Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984), a case cited with approval by *Baum*, 853 F.2d at 1075, is even more on point. In *Menhorn*, the Ninth Circuit held that a district court lacks subject matter jurisdiction over a pension applicant's claim that his employer violated the fiduciary standards section of

ERISA by denying his application, when the denial was merely the "inexorable consequence" of pre-1975 events. 738 F.2d at 1502. The employee in *Menhorn* had incurred a break in employment in 1967. The court held that the employer's post-1975 denial of his application for a pension was the direct result of the employer's pre-1975 adoption of a break-in-service policy and its warnings to him that a break in employment would terminate his previously earned credits. *Id.* Here, as in *Menhorn*, the denial of the pension application followed inexorably from the pension fund's pre-1975 adoption of its break in employment policy. Consequently, the district court's dismissal of the claim herein was proper.

On appeal, Lamontagne argues that the Fund's denial of his application was not an inexorable consequence of the break in employment policy because the trustees of the Fund had to exercise discretion in deciding whether or not to recognize his absence from covered employment as a grace period. Under Article III, § 5(c) of the Plan, an employee must apply in writing to the trustees of the Fund to have the period of absence from work recognized as a grace period. Nothing in the record indicates that Lamontagne made such an application before the Fund's 1978 denial of his pension application. Lamontagne claims that at the time of his 1986 application for a Reduced Pension, he also applied to have his absence from covered employment recognized as a grace period. It is unclear from the record whether he did apply for a grace period. However, even if he did, such an application, made in 1986, years after the event, would have no bearing on whether the Fund's 1978 denial of his pension application was inexorable. Therefore, no discretion was involved in the trustees' 1978 decision to consider Lamontagne's absence from

covered employment as a break in employment, and not as a grace period.

B. *Vesting Standards Claim*

For those pension plans in existence on January 1, 1974, the vesting standards section of ERISA, 29 U.S C. § 1053, "shall apply in the case of plan years beginning after December 31, 1975." 29 U.S.C. § 1061(b)(2) (1982). In *Cohen v. Martin's*, 694 F.2d 296 (2d Cir. 1982) (per curiam), this court affirmed the district court's dismissal of a complaint in which the plaintiff alleged that his former employer had violated ERISA's vesting provisions by terminating his pension benefits. The court held that, since the employer's pension plan existed prior to January 1974, ERISA's vesting standards section became effective in the plan year beginning January 1, 1976. *Id.* at 298. Further, the court held that since plaintiff had retired in 1973, before § 1053 became effective, ERISA's vesting standards section did not apply to his claim.

Here, the Plan was in existence on January 1, 1974; ERISA's vesting standards section became effective in the plan year beginning January 1, 1976; and Lamontagne ceased to work in covered employment in September 1971. Since he left covered employment before the 1976 effective date, ERISA's vesting standards section does not apply to his claim. Therefore, the district court's dismissal of Lamontagne's vesting standards claim was correct.

C. *Plan Violation Claim*

Lamontagne contends that even if the district court had no subject matter jurisdiction over his fiduciary standards and vesting standards claims, the court had jurisdiction over his Plan violation claim. He argues that he had a

vested right to a pension under the Plan, and that ERISA, 29 U.S.C. § 1132(a)(1)(B) (1982), provides a federal cause of action to a pension plan participant who has been denied benefits due him under a plan.

Lamontagne is correct in his statement that a pension plan participant has a federal cause of action if his vested pension rights have been violated. *See Cohen*, 694 F.2d at 300. However, he is mistaken in his belief that under the subject Plan he had a vested right to a pension. After his break in employment, all of Lamontagne's pension credits were cancelled pursuant to the break in employment policy set forth in Article III of the Plan. With no pension credits, he had no right to a pension. Since Lamontagne had no vested right to a pension, the district court acted properly in dismissing his Plan violation claim.

D. *Taft-Hartley Claim*

The district court determined, and Lamontagne does not dispute, that the statute of limitations applicable to his Taft-Hartley claim is six years. *See Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 202 n.10 (2d Cir. 1980) (statute of limitations in suit under Taft-Hartley based upon six-year period set forth in N.Y. Civ. Prac. L. & R. § 213 (McKinney 1972)). Nor does Lamontagne dispute that the cause of action for this type of claim accrues when there has been "a repudiation by the fiduciary which is clear and made known to the beneficiaries." *Id.* (emphasis omitted) (quoting *In re Barabash*, 31 N.Y.2d 76, 80, 334 N.Y.S.2d 890, 893, 286 N.E.2d 268, 270 (1972)). Here, the Fund clearly repudiated Lamontagne's pension application in 1978. Lamontagne's complaint was dated January 6, 1987. Since well over six years had passed between the time Lamontagne's claim arose and the time he filed suit, the

district court correctly held that Lamontagne's Taft-Hartley claim was time-barred.

Lamontagne contends that his Taft-Hartley claim is not time-barred because an independent cause of action accrued in 1986 when the Fund denied his application for a Reduced Pension. He argues that since in 1978 he applied for a Disability Pension, not a Reduced Pension, he did not receive clear notice of the Fund's repudiation of his application for a Reduced Pension until 1986. This argument is without merit. In its 1978 letter to Lamontagne, the Fund clearly stated that he had incurred a "break in service." The Plan, to which Lamontagne was referred, makes clear that a break in employment results in the cancellation of the employee's previously earned pension credit and that without such credit, the employee has no right to any type of pension. Since the 1978 denial should have made it evident to Lamontagne that he was ineligible for any type of pension, his cause of action against the Fund for the denial of his application accrued only once, in 1978, and not again. It would be unfair to the Fund to hold that Lamontagne could revive his cause of action simply by applying for a different type of pension at a later date.

Finally, Lamontagne argues that the 1978 denial could not have triggered the statute of limitations since that denial violated ERISA, 29 U.S.C. § 1133(1) (1982), which requires that an employee benefit plan, after denying a claim for benefits, "provide adequate notice in writing to [the employee], setting forth the specific reasons for such denial." Assuming *arguendo* that a violation of § 1133(1) would prevent the running of the statute of limitations, we conclude that this argument fails since no § 1133(1) violation occurred. The Fund's 1978 letter denying Lamon-

tagne's pension application was inartfully drafted, particularly in that it referred to the age requirements for an Early Retirement Pension when Lamontagne had applied for a Disability Pension. However, the letter did clearly state that Lamontagne's "application for pension benefits . . . fail[ed] to meet the requirements for . . . a Disability . . . Pension" and that Lamontagne "had incurred a break in service." These statements provided Lamontagne with adequate notice that his application for a Disability Pension had been denied and adequately set forth the reason for that denial.

## CONCLUSION

We have considered all of Lamontagne's other arguments and find them to be without merit. For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

Memorandum, Opinion and Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH L. LAMONTAGNE,

Plaintiff

- against -

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and the BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Defendants

87 C 0074 (MJL)

MEMORANDUM OPINION AND ORDER

A P P E A R A N C E S

EDGAR PAUK, ESQ.
Attorney for Plaintiff
Legal Services for the Elderly
132 West 43 Street - 3rd Fl.
New York, New York 10036

By: Edgar Pauk, Esq.
Of Counsel

LAMBERT & WEISS
Attorneys for Defendant
61 Broadway, Suite 2020
New York, New York 10006

By: Arthur N. Lambert, Esq. and
Susan E. Jaffee, Esq.
Of Counsel

MARY JOHNSON LOWE, D.J.:

Plaintiff Joseph L. Lamontagne filed this suit in an effort to obtain pension benefits under the Pension Plan ("the Plan") of the United Wire, Metal & Machine Pension Fund ("the Fund") (as amended through February 2, 1970).[1] He claims that the Fund denied his pension benefits in violation of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. § 1001, et seq. (1985) ("ERISA"), and the Labor Management Relations Act, 29 U.S.C.A. § 141, et seq. (1973) ("the Taft-Hartley Act" or "Taft-Hartley"). Before the Court are (1) the Fund's motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure ("F.R.Civ. P.") 12(b)(1), (2) the Fund's motion for summary judgment pursuant to F.R.Civ.P. 56,

and (3) the Fund's motion for an order striking Lamontagne's demand for a jury trial and for punitive and extracontractual damages. For the reasons given below we grant the Fund's motion to dismiss as to Lamontagne's ERISA claims, and grant the Fund's motion for summary judgment as to Lamontagne's Taft-Hartley claims on statute of limitations grounds. We therefore need not reach the Fund's other motions.

BACKGROUND

Four types of pensions are available under the Plan: Normal, Early Retirement, Reduced, and Disability. To be eligible for any of these pensions, an employee must accumulate the number of "Pension Credits"[2] specified by the Plan. In addition, to qualify for an Early Retirement Pension, an employee must be at least 55 years old. To qualify for a Normal or Reduced Pension, an

employee must be at least 65 years old. To qualify for a Disability Pension, there is no age requirement, but the employee must be disabled as determined by the Trustees of the Fund. See Pension Plan of the United Wire, Metal & Machine Pension Fund (in Plaintiff's 3(g) Statement at Exhibit 2) (hereinafter cited as "Plan"), at Article II.

The Plan also contains a break-in-service rule. This rule is intended to limit benefits to those employees who remain in "covered employment"[3] "more of [sic] less continuously over a period of years and up to the time when they retire on a pension." Plan at Art. III, § 5(a). Under the rule, an employee's previously accrued Pension Credits are canceled if he or she works less than 800 hours in covered employment within any period of two con-

secutive calendar years or fails to have paid on his or her behalf specified amounts of contributions within such period. Plan at Art. III, § 5(b). However, the Plan states that no cancellation of Pension Credits may occur if an employee has already met both the age and the service requirements for a Normal, Reduced, or Early Retirement Pension. Plan at Art. III, § 5(d). (This vesting provision does not apply to Disability Pensions.)

A limited exception to the break rule is also available on account of disability. If an employee is absent from covered employment or otherwise fails to earr Pension Credits for up to 8 quarters due to "total disability", the absence shall be considered a "grace period," and shall not count toward a break in covered employment. The employee must, however, make a written

application to the Fund's Trustees in order to have a period of disability recognized as a grace period. Plan at Art. III, § 5(c).

Lamontagne was born on January 17, 1920. He worked in covered employment as a machinist for Detecto Scales, Inc. from 1954 to September 7, 1971, when he aggravated a back injury. He received Workmen's Compensation until April 8, 1972.

Soon thereafter, though still ailing, he applied for his old job at Detecto Scales. He was told that he could no longer perform the strenuous work required of a machinist. In an effort to secure some form of covered employment, he then went to the office of the United Wire, Metal & Machine Union. He was told that there were no jobs within covered employment which he was capable of securing. He

never returned to covered employment. Verified Complaint at ¶¶ 9-13.[4]

From 1972 through 1977 Lamontagne worked in various jobs, none of which qualified under the Plan as covered employment. During this time his health worsened, and on January 20, 1977 he left his last job. Verified Complaint at ¶¶ 15-18. On April 19, 1978 he applied to the Fund for a Disability Pension. Affidavit of E. Pauk at Exh. 3. In a letter from the Fund dated November 14, 1978, his application was denied on the grounds that he had suffered a break in covered employment five years earlier, thereby forfeiting his pension credits.[5]

On or about November 7, 1986, plaintiff applied for a Reduced Pension. By letter dated December 3, 1986, the application was denied. The Trustees, in fact,

refused to consider the application at all:

> In view of the fact that in 1978 the Board of Trustees determined that a break-in-service [sic] occurred in 1972, the Board of Trustees has determined that Mr. Lamontagne is not a participant or beneficiary within the meaning of ERISA and declined the reconsideration of their determination of 1978 ...

Affidavit of E. Pauk at Exh. 6. That 1972 break accordingly rendered plaintiff ineligible for all pensions provided by the Fund, not simply the ones for which he had already applied. Id.[6]

DISCUSSION

1. ERISA Subject Matter Jurisdiction

Where a motion to dismiss challenges the actual existence -- rather than simply the allegations -- of subject matter jurisdiction, the party invoking federal jurisdiction has the burden of proving it by legally sufficient evidence contained in affidavits or otherwise. F.R.Civ.P.

12(b)(1). Kamen v. AT&T, 791 F.2d 1006, 1011 (2d Cir. 1986); Exchange National Bank of Chicago v. Touche Ross and Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976). See also Walker v. Jones, 733 F.2d 923, 935 (D.C. Cir.), cert. denied, 469 U.S. 1036 (1984). Plaintiff has not met this burden here.

Plaintiff alleges that, by "fail[ing] to reform the Plan" and by denying his pension benefits, the defendants violated their fiduciary duties under Section 404(a) of ERISA, 29 U.S.C.A. § 1104(a) (1985). He also alleges that the defendants' denial of pension benefits to him violated ERISA's minimum vesting standards, ERISA § 203, 29 U.S.C.A. § 1053 (Supp. 1988). He asserts that jurisdiction over these causes of action lies pursuant to Section 502(e) of ERISA, 29 U.S.C.A. § 1132(e) (1985). The Fund argues that there is no jurisdiction

over either the fiduciary duty provisions or the minimum vesting standards of ERISA because the acts and omissions relevant to plaintiff's cause of action preceded the dates on wich these provisions became effective. We agree.

a. Jurisdiction Over Fiduciary Duty Claim

Section 404(a) of ERISA, 29 U.S.C.A. § 1104(a) (1985), provides that a fiduciary is to discharge his or her duties

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

29 U.S.C.A. § 1104(a)(1)(B). In passing ERISA, Congress determined that federal courts are to have "exclusive jurisdiction with respect to [pension-related] actions involving breach of fiduciary responsi-

bility." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), reprinted in U.S. Code Congressional & Administrative News 5038, 5109 (statement of Sen. Williams). See 29 U.S.C.A. §§ 1132(a)(3), (e)(1). ERISA § 502(e), 29 U.S.C.A. 1132(e) (1985), accordingly provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a [plan] beneficiary."

However, Section 502 merely authorizes federal courts to hear suits involving a broad spectrum of pension claims. It does not purport to define particular causes of action or state when such claims become effective. Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 892 (1st Cir. 1978). ERISA's drafters recognized that it would be unfair to judge pre-ERISA

conduct retrospectively by ERISA's standards. See, e.g., Quinn v. Country Club Soda Co., 639 F.2d 838, 840 (1st Cir. 1981). Hence, ERISA § 514(b)(1), 29 U.S.C.A. § 1144(b)(1) (1985), provides that ERISA's preemption of state law under § 1144(a) "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." Similarly, ERISA § 414(a), 29 U.S.C.A. § 1114(a) (1985), states that, except where specifically noted, "this part [regarding fiduciary responsibility] shall take effect on January 1, 1975." Thus, in the absence of diversity, unless the cause of action arose and relevant events occurred after January 1, 1975, there is no federal jurisdiction over the claim. Menhorn v. Firestone Tire and Rubber Co., 738 F.2d 1496, 1503 (9th Cir. 1984). See

Malone v. White Motor Corp., 435 U.S. 497, 499 n.1 (1978) (ERISA "expressly disclaims" effect with respect to events prior to January 1, 1975).

Here, though the cause of action accrued after January 1, 1976,[7] the relevant acts and omissions did not. While the statute does not specify or define such acts or omissions, courts have adhered to the view they consist of "the substantial conduct forming the basis of the action." Menhorn, 738 F.2d at 1501; Cowan, 586 F.2d at 895; Martin v. Bankers Trust Co., 565 F.2d 1276, 1278-79 (4th Cir. 1977). Here, such conduct clearly occurred prior to January 1, 1975. Specifically, plaintiff left covered employment in April, 1972. Pursuant to the terms of the Plan and standard construction thereof by the Trustees, he suffered a service break as

of then. The subsequent denial of plaintiff's pension application was simply the "inexorable consequence" of the Trustees' pre-1975 decision; it involved no exercise of discretion under or interpretation of the Plan, and therefore cannot be considered conduct which formed the basis of the action. Menhorn, 738 F.2d at 1502. Thus, there is no jurisdiction over plaintiff's fiduciary duty claim.

b. Jurisdiction Over the Minimum Vesting Claim

Section 203 of ERISA, 29 U.S.C.A. § 1053 (Supp. 1988), prescribes the minimum vesting standards required of a pension plan. "Each pension," the provision reads, "shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and" a specified duration

of service. ERISA § 203(a), 29 U.S.C.A. § 1053(a). ERISA further defines an "employee" as "any individual employed by an employer." 29 U.S.C.A. § 1002(6) (Supp. 1988). An employee is to be distinguished from a plan "participant," who is more expansively defined as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." 29 U.S.C.A. § 1002(7) (Supp. 1988).

The effective date of ERISA's minimum vesting provision is governed by ERISA § 211(b)(2), 29 U.S.C.A. § 1061(b)(2) (1985), which states that "in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975." Section 203 thus provides a federal cause of action only to those who were employed by a plan employer as of January 1, 1976.

Cohen v. Martin's, 694 F.2d 296 (2d Cir. 1982). Since plaintiff left covered employment in 1972, no pension rights had vested on his behalf. There is thus no jurisdiction to consider his minimum vesting claim. Id. at 298-300. See also Wiesner v. Romo Paper Products Corp. Employees' Retirement Plan, 514 F.Supp. 289 (E.D.N.Y. 1981); Nostrome v. Consolidated Edison Co. of New York, 504 F.Supp. 507 (S.D.N.Y. Keller v. Syracuse China Corp., 473 F.Supp. 459 (N.D.N.Y. 1979); Blazquez v. New York City District Council of Carpenters Pension Fund, 463 F.Supp. 727 (S.D.N.Y. 1979).[8]

2. Taft-Hartley Statute of Limitations

Section 302(e) of the Taft-Hartley Act, 29 U.S.C.A. § 186(e) (1978), grants federal courts jurisdiction to remedy "structural" defects in pension plans

established pursuant to § 302(c)(5), 29 U.S.C.A. § 186(c)(5) (Supp. 1988). Subsection (c)(5) bars payments by employers to employee representatives unless such payments are "to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . ." Lamontagne alleges that the Plan contains two structural defects. First, he says that the Plan's break-in-service provision operates to deny benefits to some applicants with substantially greater service than others who receive benefits. Second, he claims that the Plan's grace period provision, as construed by the Trustees, is only applicable to participants who return to covered employment after a break, thus causing an arbitrary distinction between a break suffered during, and one suffered at the

end of, a period of covered employment. Plaintiff's Memorandum of Law at 32-33.

We need not consider the jurisdictional[9] or meritorious aspects of plaintiff's Taft-Hartley claims because they are barred by the statute of limitations. We accept as true plaintiff's position that the statute of limitations governing the Taft-Hartley claim is six years. This is based on N.Y. Civ. Prac. L. & R. 213 (McKinney 1972 & Supp. 1988). See Valle v. Joint Plumbing Industry Board, 623 F.2d 196, 202 n.10 (2d Cir. 1980).

As mentioned above, a cause of action under Taft-Hartley accrues when there is a clear denial of benefits. Miles v. New York State Teamsters Conf. Pension Fund, 698 F.2d 593, 598 (2d Cir. 1983). In this case that denial occurred no later than November, 1978 when the Trustees denied

Lamontagne's application for a Disability Pension. The statute of limitations had therefore run by November, 1984. The complaint in this action was filed in January, 1987. Plaintiff's action is thus time-barred.

Plaintiff argues that the statute of limitations has only run on his rights to a Disability Pension, since that is solely what he had applied for and been denied, and that the statute has yet to run on his rights to a Normal Pension, for which he applied in November, 1986. We disagree. In accordance with the Plan's provisions, the Trustees denied Lamontagne's application for a Disability Pension because his service break had cancelled his accrued Pension Credits. It is plain from the terms of the Plan and the construction thereof by the Trustees that such a cancel-

lation applies to all pensions under the Plan, not just to a particular pension for which an employee has applied. See Plan at Article III, § 5; Affidavit of E. Pauk at Exh. 6 (December 3, 1986 Letter from S. Meyer, Attorney for Pension Fund, to Edgar Pauk, Esq., Attorney for Plaintiff).

For the above reasons, the complaint is dismissed.

It Is So Ordered.

Dated: New York, New York
July 7, 1988

/s/_____
MARY JOHNSON
United States District Judge

FOOTNOTES

[1]Because the defendant Trustees administer the defendant Pension Plan, because plaintiff's five causes of action are asserted jointly against both defendants, and because he does not otherwise significantly distinguish between defendants in the pleadings, this opinion shall refer to the defendants as "the Fund."

[2]The term "Pension Credit" is defined by the Plan as "the years in quarters of years of credit for work . . . which are accumulated and maintained for employees. . . ."

[3]"Covered Employment" is defined by the Plan as "(a) employment for which Past Service Credit is granted in accordance with Article III hereof, and (b) employment with an Employer for which contributions are paid to the Pension Fund and for which

Future Service Credit is granted in accordance with ARticle III hereof." Plan at Art. I, § 7. In essence, covered employment is work which is counted toward an employee's pension.

[4]Lamontagne states that he went to the Fund's office and informed someone there that he was disabled and in dire financial need. He was, he says, told to wait until he reached age 55 to apply for a pension. He was at that time 52 and, having worked for longer than 15 years, possibly qualified for a Disability Pension. He did not, however, apply for such a pension. Since he has not plead these facts as a cause of action, we need not pass on the legal significance, if any, of them.

[5]The five-year figure appears to be erroneous. It is undisputed that the Trustees calculate a break from the time an

employee leaves covered employment. Def.'s Memorandum of Law at 9. Plaintiff left covered employment in 1972. Thus, Plaintiff's break appears to have occurred six years prior to the time of his application.

The letter also appears to be unresponsive to the particular type of pension for which plaintiff applied. Plaintiff applied for a Disability Pension, which, again, contains no minimum age requirement. The Fund's letter, though, states in relevant part that "at the time of your [1972] termination you were 52 years of age. To be eligible for an Early Retirement Pension then you had to be 55 years of age. Therefore, todate [sic] you had incurred a break in service of 6 years. . . ." The letter nowhere specifically refers to a Disability Pension. Nevertheless, the

Fund's finding that a break occurred in 1972 is dispositive of plaintiff's eligibility for a Disability Pension, since such a break in service forfeits Pension Credits for all Plan pensions, and since he never applied for a "grace period" exemption from the break-in-service provision.

[6]On the motion, Lamontagne offers a novel though unpersuasive argument that he suffered no break in service in 1972 for purposes of an Early Retirement Pension. He argues that since he left covered employment in 1972, and since the Plan defines a break as any period of two consecutive calendar years in which an employee fails to work 800 hours in covered employment, his break should be construed to have occurred on January 1, 1975, 16 days before his 55th birthday (when his rights would have vested in an Early

Retirement Pension), and four months after the enactment of ERISA. Since, the argument continues, a break can be excused for up to 8 quarters by totl disability, and since plaintiff was totally disabled, he is entitled to a "grace period" covering those 16 days. Plaintiff's Memorandum of Law at 6-7.

However, as stated above, it is undisputed that the Trustees have consistently calculated a break in service from the time the employee leaves covered employment. Plaintiff's Memorandum of Law at 9. In order for plaintiff's calculation to even be considered, he would have to establish that defendant's calculation was arbitrary and capricious, which he has not even alleged. See Dellacava v. Painters Pension Fund of Westchester and Putnam Counties, No. 87-7978 (2d. Cir. June 10, 1988); Miles

v. New York State Teamsters Conf. Pension Fund, 698 F.2d 593 (2d Cir. 1983). Moreover, plaintiff has failed to make written application to the Trustees for a 16-day grace period, as he must do under the terms of the Plan. Plan at Art. III, § 5(c).

[7]The date of accrual is deemed to be the date on which an application for pension benefits is denied. Miles v. New York State Teamsters Conference Pension Fund, 698 F.2d 593, 598 (2d Cir. 1983). Lamontagne's application was denied in 1978.

[8]Because plaintiff never had a vested right to a pension under either a pre-ERISA or ERISA plan, the Court need not consider, as plaintiff suggests, those cases which hold that ERISA provides a federal forum for wrongful termination of benefits which vested prior to ERISA's effective date.

See Cohen, 694 F.2d at 299-300, discussing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), Van Fossen v. International Brotherhood of Teamsters, 649 F.2d 1243 (7th Cir. 1981), and Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978).

[9]As the Second Circuit has recognized, "[t]he scope of federal jurisdiction under sections 302(c)(5) and (e) is far from settled." Local 50, Bakery and Confectionary Workers Union v. Local 3, Bakery and Confectionary Workers Union, 733 F.2d 229, 233 (2d Cir. 1984). Generally, this Circuit has adhered to the "narrow" view that Section 302(e) neither authorizes courts to examine the propriety of a pension denial under the terms of a plan or administration by trustees, nor gives courts "a roving jurisdiction over even the structure of pension plans." Riley v. MEBA

Pension Trust, 570 F.2d 406, 412 (2d cir. 1977) (Friendly, J.). Local 50, 733 F.2d at 234 (reaffirming the so-called narrow view). Nevertheless, "so long as plaintiff's claim that the section has been violated is not 'wholly insubstantial and frivolous,' jurisdiction exists." Lugo v. Employees Retirement Fund of Illumination Products Industry, 529 F.2d 251, 256 (2d Cir. 1976) (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)). Although tenuous, plaintiff's allegations of structural defects in the Plan do not appear to be insubstantial and frivolous.

APPENDIX C

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March, one thousand nine hundred and eighty-nine.

PRESENT: Hon. THOMAS J. MESKILL
Hon. LAWRENCE W. PIERCE
Hon. ROGER J. MINER
Circuit Judges

88-7703

JOSEPH L. LAMONTAGNE,

Plaintiff-Appellant,

V

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Defendants-Appellees.

(Filed March 17, 1989, Elaine B. Goldsmith, Clerk, By: FRED M. CASSIDY, Chief Deputy Clerk.)

A petition for a rehearing having been filed by Plaintiff-Appellant JOSEPH L. LAMONTAGNE.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

/s/_____
By: FRED M. CASSIDY
Chief Deputy Clerk

## APPENDIX D: Relevant Statutory Provisions

### EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED

§ 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with

like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer

securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)-

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part

for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

§ 1144. Other laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred,

before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment

companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any

agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2012

In the

# Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH L. LAMONTAGNE,

*Petitioner,*

*against*

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

*Respondents.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR N. LAMBERT
*Attorney for Respondents*
LAMBERT & WEISS
61 Broadway, Suite 2020
New York, New York 10006
(212) 344-3100

ARTHUR N. LAMBERT
SUSAN E. JAFFEE
*Of Counsel*

## TABLE OF CONTENTS


Table of Authorities ..... ii

Counter-Statement of the Case ..... 1

Summary of Argument ..... 7

ARGUMENT

POINT I—This case is not appropriate for review by this Court, as the sole issue raised in the petition for certiorari is not dispositive and the petitioner has failed to seek review of the major dispositive issues.. 8

POINT II—The petitioner's ERISA claims warrant dismissal, as they are time-barred and he is clearly ineligible for benefits from the Pension Fund ..... 11

A. The petitioner's ERISA claims are barred by the appropriate statutes of limitations ..... 12

B. The petitioner is ineligible for benefits under the terms of the applicable Pension Plan ..... 17

POINT III—The Court of Appeals correctly construed and applied the exception to the preemption provision in Section 514(b)(1) of ERISA under the facts and circumstances at bar; the construction advocated by the petitioner would not alter the substantive result ..... 21

A. The Court of Appeals correctly construed and applied Section 514(b)(1) of ERISA..... 23

B. The case law and reasoning supporting the petitioner's assertion that ERISA's fiduciary standards apply to all post-1975 denials of benefits are flawed ..... 24

C. The petitioner's proposed construction of Section 514(b)(1) does not alter the substantive result, as he is ineligible for benefits under the terms of the Pension Plan ..... 26

Conclusion..... 28

## Table of Authorities

### United States Authorities

Labor-Management Relations Act ("Taft-Hartley Act").. 13

Taft-Hartley Act, Section 302(C)(5), 29 U.S.C. Section 186 (C)(5) ..... 6

302(e), 29 U.S.C. Section 186(e) ..... 12

Employee Retirement Income Security Act of 1974, as amended ("ERISA") ..... *passim*

ERISA Section 203, 29 U.S.C. Section 1053 ..... 6, 12

203(b)(1)(F), 29 U.S.C. Section 1053(b)(1)(F) ..... 18, 23, 26

404(a), 29 U.S.C. Section 1104(a) ..... 6, 9, 12

404(a)(1)(D), 29 U.S.C. Section 1104(a)(1)(D) ..... 20

413(a), 29 U.S.C. Section 1113(a) .... 7, 9, 12, 13

502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B) ..... 7, 10, 13, 14, 19

503(1), 29 U.S.C. Section 1133(1)..... 16

514(b)(1), 29 U.S.C. Section 1144(b)(1) ... 7, 8, 9, 10, 21, 22, 23, 24, 25, 26, 27

Rules of the United States Supreme Court

Rule 21.1(a) ..... 10, 11

### Cases

*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) ..... 20

*Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) ..... 13

*Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984)..... 17

TABLE OF AUTHORITIES

*City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), *reh'g denied*, 473 U.S. 925, 106 S.Ct. 16, 87 L.Ed.2d 695 (1985) ..... 11

*City of Springfield, Mass, v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987), *reh'g denied*, 481 U.S. 1033, 107 S.Ct. 1966, 95 L.Ed.2d 537 (1987) ..... 10

*Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888 (1st Cir. 1978) ..... 25, 26

*Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070, 103 S.Ct. 1526, 75 L.Ed.2d 948 (1983) ..... 25

*Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d 975 (4th Cir. 1987) ..... 13-14

*Dameron v. Sinai Hospital of Baltimore, Inc.*, 595 F.Supp. 1404 (D. Md. 1984) ..... 13, 14

*Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989).. 24, 27

*Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989 ..... 20, 27

*Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985) ..... 16, 21

*Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) ..... 19, 27

*Gent v. Allied-Signal Inc.*, No. 87-C-397-B (N.D. Okla. Dec. 9, 1987) ..... 20

*Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 588 (1986) ..... 16

*Haeberle v. Board of Trustees of Buffalo Carpenters Health Care, Dental, Pension & Supplemental Funds*, 624 F.2d 1132 (2nd Cir. 1980) ..... 18

*Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779 (9th Cir. 1988) ..... 20

TABLE OF AUTHORITIES

*Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1959, 76 L.Ed.2d 66 (1983) ..... 10, 11

*Helms v. Hewitt*, 712 F.2d 48 (3rd Cir. 1983) ..... 17, 18

*Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988). 20

*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) ..... 10, 11

*Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund*, 869 F.2d 153 (2nd Cir. 1989) ..... 6-7, 22, 25, 26

*Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980) ..... 25

*Lee v. Garrett Corp. Retirement Plan*, 803 F.2d 1082 (9th Cir. 1986) ..... 25

*Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984) ..... 22, 23, 25, 26

*Morgan v. Laborers Pension Trust Fund for Northern California*, 433 F.Supp. 518 (N.D. Calif. 1977) ..... 14, 17

*Pilot Life Insurance co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) ..... 27

*Poggi v. New York Shipping Association-International Longshoremen's Association Pension Trust Fund*, 624 F.Supp. 983 (S.D.N.Y. 1985) ..... 18

*Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) ..... 10

*Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981) ..... 23, 25, 26

*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976) ..... 10-11

*Rochester Radiology Associates, P.C. v. Aetna Life Insurance Co.*, 616 F.Supp. 985 (W.D.N.Y. 1985) ..... 13

TABLE OF AUTHORITIES

*Rodriguez v. MEBA Pension Trust*, 872 F.2d 69 (4th Cir. 1989) ..... 24

*Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1989)..... 20

*Smith v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of Southern California*, 857 F.2d 587 (9th Cir. 1988) ..... 25

*Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) ..... 10, 11

*Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3rd Cir. 1985) .....23, 24, 27

*United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) ..... 10

*Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981) ..... 17

*Vance v. Terrazas*, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980), *reh'g denied*, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed.2d 606 (1980)..... 11

*Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) ..... 10

*Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979) .....24, 25, 26

*Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983)... 16

*Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981) ..... 24, 25

In the

# Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH L. LAMONTAGNE,

*Petitioner,*

*against*

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

*Respondents.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, United Wire Metal and Machine Pension Fund[1] and the Board of Trustees of the United Wire Metal and Machine Pension Fund, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Joseph L. Lamontagne, seeking review of the order of the United States Court of Appeals for the Second Circuit entered in this case on February 27, 1989.

### Counter-Statement of the Case

This section corrects the inaccuracies and omissions in the brief statement of the case in the petition for certiorari. Respondents respectfully submit that a thorough understanding of the facts, including the relevant provisions of the applicable Pension Plan and the petitioner's employment history, is essential to enable this Court to make a reasoned determination whether to grant the petition and review this matter.

[1] The United Wire, Metal and Machine Pension Fund was incorrectly sued as the "Pension Plan of the United Wire, Metal and Machine Pension Fund."

**The Pension Plan**

The petitioner's eligibility for a pension is governed by the terms of the Pension Plan of the United Wire, Metal and Machine Pension Fund (the "Pension Plan"), as amended through February 2, 1970. Article I, Section 7 of the Pension Plan defines "Covered Employment" as employment in which the employee earns credit towards a pension provided by the United Wire, Metal and Machine Pension Fund (the "Pension Fund").

The Pension Plan established four categories of pensions: (1) a Normal Pension, (2) a Reduced Pension, (3) an Early Retirement Pension and (4) a Disability Pension. In order to qualify for a Disability Pension, an employee must become "totally and permanently disabled" after having accrued at least 15 years of pension credit. "Total and permanent disability" is defined by Article II, Section 10 of the Pension Plan, as follows:

> An Employee shall be deemed to be totally and permanently disabled if on the basis of medical evidence satisfactory to the Trustees, he is found to be totally and permanently unable as a result of bodily injury or disease to engage in Covered Employment and provided further that he does not earn more than $1,200 a year in any other employment or gainful pursuit whatsoever. The Trustees shall be the sole and final judges of a total and permanent disability and of entitlement to a Disability Pension.

In order to qualify for a Normal, Reduced or Early Retirement Pension, an employee must accumulate a given number of years of pension credit and must retire *after* he has attained a minimum age. The minimum retirement age for the Normal and Reduced Pensions is 65. An employee must retire after attaining age 55 in order to be eligible for an Early Retirement Pension. Article II, Section 13(a) of the Pension Plan provides, "Retirement shall mean complete withdrawal from any work in Covered Employment".

**Break In Service Rule**

Article III, Section 5(b) of the Pension Plan defines a "break in employment"[2] as follows:

> It shall be considered a break in employment and a person's previous Pension Credits shall be cancelled if after his Contribution Date the Employee fails to work at least 800 hours in Covered Employment within any period of two consecutive calendar years or fails to have paid on his behalf the following amounts of contributions as applicable within any period of two consecutive calendar years . . . .

Article III, Section 5(c) of the Pension Plan authorizes the Board of Trustees to allow an additional "grace period", not counted towards a break in employment, for a period of up to 8 quarters during which an employee is absent and fails " . . . to earn Pension Credit because of total disability for work in Covered Employment . . . ". Article III, Section 5(c) provides, as follows:

> C. Exception on Account of Disability
>
> A period of absence from Covered Employment to a maximum of 8 quarters, during which an Employee failed to earn Pension Credit because of total disability for work in Covered Employment shall be considered a grace period and, therefore, shall not be counted toward a break in Covered Employment. For purposes of this provision an Employee shall be deemed totally disabled only if on the basis of medical evidence satisfactory to the Trustees he has been found to be totally unable as a result of bodily injury or disease to engage in Covered Employment. The Trustees shall be the sole and final judges of total disability within the meaning of this Section and entitlement to the grace period provided herein.

---

[2] A "break in employment" is also known as a "break in service".

> For periods after January 1, 1961, an Employee shall make written application to the Trustees for recognition of a period of disability as a grace period and no such recognition shall be granted for a period which is more than 12 months before the time of application, except if the Trustees find that extenuating circumstances prevented earlier application.

According to Article III, Section 5(a) of the Pension Plan, the purpose of the break in employment provision is " . . . to provide benefits to Employees who remained in Covered Employment more or less continuously over a period of years and up to the time when they retire on a pension."

### The Petitioner's Employment History and Application for Pension Benefits

The petitioner was born on January 17, 1920. He worked in covered employment as a machinist for Detecto Scales, Inc. from 1954 until September 7, 1971, when he aggravated a back injury. He received Workmen's Compensation until April 8, 1972 (A-17).[3]

The petitioner worked as a "spot welder" for another manufacturing concern from 1973 through 1977. However, the Pension Fund received no contributions on the petitioner's behalf during this period, as he was not engaged in "covered employment" for the purposes of the Pension Plan. After he left this manufacturing job in January, 1977, the petitioner collected unemployment insurance.

In April, 1978, the petitioner applied to the Pension Fund for a Disability Pension. In a letter dated November 14, 1978, the Plan Administrator informed the petitioner that the Board of Trustees of the Pension Fund had denied his " . . . application for pension benefits for failure to meet the requirements for either a Disability or Partial Pension from the Fund." Based

---

[3] Page references preceded by "A" refer to the appendix to the petition for certiorari. The facts in this paragraph are taken from the Memorandum, Opinion and Order of Hon. Mary Johnson Lowe, which is reprinted in the appendix to the petition for certiorari.

upon earnings records from Detecto Scales and the Social Security Administration, the Trustees found that the petitioner left covered employment with Detecto in 1972, when he was approximately 52 years of age,[4] several years prior to attaining the minimum retirement age of 55 in order to qualify for an Early Retirement Pension. The November, 1978 letter informed the petitioner that he had incurred a break in service of approximately 5 years since he left Detecto Scales, as he failed to work at least 800 hours in covered employment within any period of two consecutive calendar years during that time. In accordance with Article III, Section 5(b) of the Pension Plan, the break in service incurred by the petitioner after he left covered employment with Detecto Scales permanently resulted in the cancellation of his accrued pension credits.[5]

The November, 1978 letter concluded by informing the petitioner that he had a right to appeal the denial of his application to the full Board of Trustees within sixty days. The letter explained to the petitioner how to perfect his appeal and inspect the pertinent documents. The petitioner never pursued this internal appeal procedure.

On or about November 7, 1986, approximately 8 1/2 years after his first application, the petitioner submitted another application, purportedly for a Reduced Pension which requires

---

[4] The earnings records from the Social Security Administration, which the Trustees obtained, showed that the petitioner earned a small amount of money from Detecto Scales in 1972. However, it is undisputed that the petitioner left Detecto Scales permanently in September, 1971 and this comports with the findings of both the District Court (A-17) and the Court of Appeals (A-3).

[5] A copy of the applicable Pension Plan was enclosed in the November, 1978 letter. In a further effort to determine whether the petitioner was eligible for pension benefits, the Trustees inquired whether the union, which represented him in the manufacturing job he held from 1973 until 1977, subscribed to the National Reciprocal Agreement for Teamster Pension Funds. A Partial Pension is available if another pension fund subscribes to the National Reciprocal Agreement, which allows pension credits from two or more different funds to be combined to afford an employee a partial pension from each fund. Unfortunately, this union did not honor the reciprocity agreement and, thus, the petitioner was ineligible for a Partial Pension.

retirement after the employee attains age 65. By letter dated December 3, 1986, the counsel to the Pension Fund informed the petitioner's attorney that the Board of Trustees had declined to reconsider their November, 1978 determination that the petitioner had incurred a break in service in 1972, prior to the effective date of ERISA. The letter point out, "Since a break-in-service occurred in 1972, the letter sent out in November, 1978 was determinative of all pensions that Mr. Lamontagne was, or could have been, eligible for."

**Prior Proceedings**

By summons and verified complaint dated January 6, 1987, over fifteen years after he left covered employment permanently, the petitioner commenced this action seeking to challenge the Board of Trustees' denial of his application for pension benefits. The complaint alleged: (1) that the Board of Trustees violated their fiduciary duties under Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. Section 1104(a); (2) that the denial of pension benefits to him violated the minimum vesting standards in ERISA Section 203, 29 U.S.C. Section 1053, and (3) that the Plan's break in employment provision constituted a "structural defect" violative of Section 302(c)(5) of the Labor-Management Relations Act (the "Taft-Hartley Act"), 29 U.S.C. Section 186(c)(5).

Respondents moved (1) to dismiss the complaint for lack of federal subject matter jurisdiction under ERISA and (2) for summary judgment.

The District Court granted the respondents' motion and dismissed the complaint. Hon. Mary Johnson Lowe concluded that there was no federal subject matter jurisdiction over the petitioner's claims brought pursuant to the fiduciary standards and minimum vesting provisions of ERISA. Judge Lowe also concluded that the petitioner's claims under the Taft-Hartley Act were time-barred pursuant to a six-year statute of limitations, which began to run when his application for pension benefits was denied in November, 1978 (A-12-31). The United States Court of Appeals affirmed the conclusions of the District Court in an opinion (A-1-11); reported as *Lamontagne v. Pension*

*Plan of the United Wire, Metal and Machine Pension Fund*, 869 F.2d 153 (2nd Cir. 1989).

## Summary of Argument

The sole issue presented for review by this Court in the petition for a writ of certiorari is whether the fiduciary standards in ERISA, which became effective on January 1, 1975, apply to all denials of pension benefits occurring on or after that date, regardless of whether a denial was based upon the provisions of an employee benefit plan adopted prior to ERISA's effective date, as was the case at bar. This issue deals with the construction of Section 514(b)(1) of ERISA, 29 U.S.C. Section 1144(b)(1).

Respondents respectfully submit that the issue presented for review in the petition for certiorari is not dispositive of this case. The petitioner's claims brought pursuant to ERISA challenging the determination by the Trustees denying his application for pension benefits warrant dismissal for several major reasons. Firstly, the petitioner's ERISA claims are barred by the statute of limitations set forth in ERISA Section 413(a), 29 U.S.C. Section 1113(a), applicable to actions alleging breach of fiduciary duty, and by the state statute of limitations applicable to actions to recover benefits due under the terms of the plan, brought pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B). The petitioner's causes of action, pursuant to both ERISA's fiduciary standards provisions and ERISA Section 502(a)(1)(B), accrued on or about November 14, 1978, the date of the letter from the Plan Administrator notifying the petitioner of the Trustees' determination to deny his application for pension benefits, as he had incurred a break in service when he left covered employment permanently in 1971. Secondly, the petitioner is clearly ineligible for a pension under the terms of the applicable pre-ERISA Pension Plan, as his accrued pension credits were cancelled pursuant to the break in service provision.

The petitioner has failed to request this Court to review any of the above issues, which are dispositive of his ERISA claims. Accordingly, a determination by this Court on the sole issue presented for review would not serve the interests of judicial

economy, as the petitioner's ERISA claims warrant dismissal on several other grounds.

The Court of Appeals for the Second Circuit correctly construed and applied the "act or omission" exception to the preemption provision in Section 514(b)(1) of ERISA under the circumstances at bar. The relevant "act", for the purposes of ERISA's Section 514(b)(1), was the Pension Fund's adoption of the break in employment policy prior to the January 1, 1975 effective date of the fiduciary standards provisions of ERISA. The Trustees' denial of the petitioner's pension application was the inexorable consequence of this pre-ERISA break in employment policy. The construction of Section 514(b)(1) of ERISA by the Second Circuit, which is in accord with decisions from the Courts of Appeals for the First, Seventh, Eighth and Ninth Circuits, comports with the intent of Congress to apply the new standards for employee benefit plans set forth in ERISA prospectively only and to prevent the pre-ERISA conduct of plan fiduciaries from being judged retroactively under ERISA's standards. Additionally, in view of the petitioner's ineligibility for benefits under the terms of the Pension Plan, review by this Court of the issue raised in the petition for certiorari would not alter the substantive result reached by the Court of Appeals, the dismissal of the petitioner's complaint.

## ARGUMENT

## POINT I

### This case is not appropriate for review by this Court, as the sole issue raised in the petition for certiorari is not dispositive and the petitioner has failed to seek review of the major dispositive issues.

The sole issue presented for review by this Court in the petition for a writ of certiorari is whether the fiduciary standards in ERISA, which became effective on January 1, 1975, apply to all denials of pension benefits occurring on or after that date, regardless of whether a denial was based upon the provisions of an employee benefit plan adopted prior to ERISA's effective date, as was the case at bar. This issue deals with the construc-

tion of Section 514(b)(1) of ERISA, 29 U.S.C. Section 1144(b)(1), which provides that ERISA's preemption of state law " . . . shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." The United States Court of Appeals for the Second Circuit affirmed the dismissal of the petitioner's claims brought pursuant to ERISA's fiduciary standards provisions for lack of federal subject matter jurisdiction, pursuant to ERISA Section 514(b)(1), after concluding, as follows:

> Given Lamontagne's employment history, the 1978 denial of his pension application was merely a consequence of the Fund's adoption of the break in employment policy. The relevant act for Section 1144(b)(1) purposes—the Fund's adoption of the break in employment policy—occurred before 1975. Therefore, the fiduciary standards section of ERISA does not apply to Lamontagne's claim and the ruling by the district court in dismissing it was correct. (A-6)

For the reasons discussed in further detail in Point III, *infra* of this brief, the Court of Appeals correctly construed and applied the "act or omission" provision in ERISA Section 514(b)(1) in the context of this case. There is, however, an additional compelling reason for this Court to deny the petition for certiorari at bar. Even assuming *arguendo* that this Court rejects the conclusion of the Court of Appeals on the question presented for review and concludes that federal subject matter jurisdiction exists over the petitioner's claim pursuant to the fiduciary standards set forth in ERISA Section 404(a), 29 U.S.C. Section 1104(a), said claim lacks merit for several reasons. The major grounds for rejecting the petitioner's ERISA challenge to the determination by the Trustees denying his application for pension benefits, which are discussed in further detail in Point II, *infra* of this brief, are as follows:

> (1) The petitioner's ERISA claims are barred by the statute of limitations set forth in ERISA Section 413(a), 29 U.S.C. 1113(a), applicable to actions alleging breach of fiduciary duty, and by the state statute of limitations applicable to an action to recover

benefits due under the terms of the plan, brought pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B);

(2) The petitioner's causes of action, pursuant to both ERISA's fiduciary standards provisions and ERISA Section 502(a)(1)(B), accrued on or about November 14, 1978, the date of the letter from the Plan Administrator notifying the petitioner of the Trustees' determination to deny his application for pension benefits, as he had incurred a break in service when he left covered employment permanently in 1971;

(3) The petitioner is clearly ineligible for a pension under the terms of the applicable pre-ERISA Pension Plan, as his accrued pension credits were cancelled pursuant to the break in service provision in Article III, Section 5 of the plan.

The petitioner has failed to request this Court to review any of the above issues in the petition for certiorari. Accordingly, these issues, which are dispositive of the petitioner's ERISA claims, are not properly before this Court. In accordance with Rule 21.1(a) of the Rules of this Court, "Only the questions set forth in the petition or fairly included therein will be considered by the Court." This Court has repeatedly declined to address issues not raised in the petition for certiorari or in a cross-petition for certiorari. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-59, 107 S. Ct. 1114, 1116, 94 L.Ed.2d 293, 297-98 (1987), *reh'g denied*, 481 U.S. 1033, 107 S. Ct. 1966, 95 L.Ed.2d 537 (1987); *United States v. Leon*, 468 U.S. 897, 905, 104 S. Ct. 3405, 3411, 82 L.Ed.2d 677, 686-87 (1984); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12, 103 S. Ct. 1952, 1958 n. 12, 76 L.Ed. 2d 66, 75-76 n.12 (1983); *Weinberger v. Rossi*, 456 U.S. 25, 36 n.18, 102 S. Ct. 1510, 1518 n.18, 71 L.Ed.2d 715, 724 n.18 (1982); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 397-98, 99 S. Ct. 1171, 1175-76, 59 L.Ed.2d 401, 407-408 (1979); *Procunier v. Navarette*, 434 U.S. 555, 559-560 nn. 5&6, 98 S. Ct. 855, 858-59 nn. 5&6, 55 L.Ed.2d 24, 29 nn. 5&6 (1978); *Stone v. Powell*, 428 U.S. 465, 481 n. 15, 96 S.Ct. 3037, 3046 n.15, 49 L. Ed.2d 1067, 1080 n.15 (1976); *Radzanower*

*v. Touche Ross & Co.*, 426 U.S. 148, 151 n. 3, 96 S.Ct. 1989, 1992, n.3, 48 L.Ed.2d 540, 545 n.3 (1976).

There are no exceptional circumstances at bar which would justify a departure from this Court's stated policy of declining to address issues not set forth in the petition for certiorari. *See Heckler v. Campbell*, 461 U.S. at 468-69 n.12, 103 S.Ct. at 1958 n.12, 76 L.Ed.2d at 75-76 n.12; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 398, 99 S. Ct. at 1175-76, 59 L.Ed.2d at 408; *Stone v. Powell*, 428 U.S. at 481 n.15, 96 S. Ct. at 3046 n.15, 49 L.Ed.2d at 1080 n.15. The issues omitted from the petition for certiorari are not jurisdictional in nature. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 398, 99 S. Ct. at 1175, 59 L.Ed.2d at 408. Nor are the issues concerning the statute of limitations and the petitioner's ineligibility for benefits under the terms of the applicable Pension Plan "fairly included" in the single issue raised in the petition for certiorari, the construction of the "act or omission" provision in ERISA Section 514(b)(1), 29 U.S.C. Section 1144(b)(1), within the meaning of Rule 21.1(a) of the Rules of this Court. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 814 n. 2, 105 S. Ct. 2427, 2431 n.2, 85 L.Ed.2d 791, 798 n.2 (1985), *reh'g denied*, 473 U.S. 925, 106 S.Ct. 16, 87 L.Ed.2d 695 (1985); *Vance v. Terrazas*, 444 U.S. 252, 258 n. 5, 100 S. Ct. 540, 544 n. 5, 62 L.Ed.2d 461, 468-69 n.5 (1980), *reh'g denied*, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed.2d 606 (1980).

Accordingly, this Court should decline to grant the petition for certiorari, as the single issue set forth therein is not dispositive of this matter and this Court cannot address the major dispositive issues omitted from the petition.

## POINT II

### The petitioner's ERISA claims warrant dismissal, as they are time-barred and he is clearly ineligible for benefits from the Pension Fund.

Assuming *arguendo* that this Court determines that federal subject matter jurisdiction exists over the petitioner's ERISA claims, said claims lack merit for reasons not addressed in the

petition for certiorari. Therefore, a determination by this Court on the single issue presented in the petition will not serve the interests of judicial economy, as the petitioner's challenge to the denial of his application for pension benefits is flawed on other grounds which will be addressed in further detail below.

### A. The Petitioner's ERISA Claims are Barred by the Appropriate Statutes of Limitations.

The Court of Appeals affirmed the determination of the District Court that the petitioner's claim brought pursuant to Section 302(e) of the Taft-Hartley Act, 29 U.S.C. Section 186(e), was time-barred by the applicable six-year statute of limitations. According to the Court of Appeals, the petitioner's cause of action accrued in November, 1978, when the Plan Administrator notified him in writing of Trustees' determination to deny his application for pension benefits (A-9-11). A similar result requires the dismissal of the petitioner's ERISA claims.

In the complaint, the petitioner alleges that, by denying his application for pension benefits, the Trustees breached their fiduciary duties pursuant to ERISA Section 404(a), 29 U.S.C. Section 1104(a).[6] The statute of limitations for breach of fiduciary duty claims is set forth in ERISA Section 413(a), 29 U.S.C. Section 1113(a). This section provides that no action alleging a breach of fiduciary duty pursuant to ERISA may be commenced

> . . . after the earlier of -
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation . . .

---

[6] The petitioner's claim that the denial of his application for pension benefits violated the minimum vesting standards set forth in ERISA Section 203, 29 U.S.C. Section 1053 was properly rejected by the Court of Appeals and he has not requested review of this issue in the petition for certiorari.

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

In the instant case, the Court of Appeals correctly concluded that the petitioner's cause of action pursuant to the Taft-Hartley Act accrued in November, 1978. At that time, the Plan Administrator informed him in writing that he was ineligible for pension benefits, as his accrued pension credits had been cancelled, pursuant to the terms of Article III, Section 5 of the Pension Plan, when he incurred a break in service by withdrawing permanently from covered employment in 1971. The petitioner's cause of action for breach of fiduciary duty pursuant to ERISA, likewise, accrued in November, 1978. This is the earliest date on which the petitioner had "actual knowledge of the breach or violation" within the meaning of ERISA Section 413(a), in this case the Trustees' denial of his application for pension benefits on the ground that he had incurred a break in service. Accordingly, the statute of limitations for the petitioner's breach of fiduciary duty claim expired in November, 1981, three years after the letter of November, 1978. *See Rochester Radiology Associates, P.C. v. Aetna Life Insurance Co.*, 616 F.Supp. 985, 989 (W.D.N.Y. 1985); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 595 F.Supp. 1404, 1411-12 (D. Md. 1984). At the latest, the statute of limitations for the petitioner's breach of fiduciary duty claim expired in November, 1984, six years after the November, 1978 letter denying his application.

In addition to the allegations that the Trustees violated ERISA's fiduciary standards set forth in the complaint, the petitioner asserted before the District Court and the Court of Appeals that ERISA afforded him a federal cause of action for denial of benefits in violation of the terms of the applicable Pension Plan. ERISA contains no statute of limitations for actions to recover benefits brought pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1) (B). Accordingly, the federal courts have applied the most appropriate state statute of limitations, which has consistently been held to be the limitations period applicable to actions for breach of contract. *See Anderson v. John Morrell and Co.*, 830 F.2d 872, 877 (8th Cir 1987); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d

975, 981 (4th Cir. 1987); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 595 F.Supp. at 1413; *Morgan v. Laborers Pension Trust Fund for Northern California*, 433 F.Supp. 518, 526 (N.D. Calif. 1977). In the instant case, the six-year statute of limitations for breach of contract actions in New York, which the Court of Appeals applied to the petitioner's Taft-Hartley claim, would also govern his claim for benefits pursuant to ERISA Section 502(a)(1)(B). The finding by the Court of Appeals that the petitioner's Taft-Hartley claim accrued in November, 1978, when the Plan Administrator clearly apprised him of the Trustees' repudiation of his claim for benefits (A-9), applies with equal force to his cause of action pursuant to ERISA Section 502(a)(1)(B). Accordingly, the statute of limitations for said claim expired in November, 1984, over two years before the petitioner commenced the instant action.

The Court of Appeals correctly rejected the petitioner's argument that his belated request for reconsideration of the Trustees' rejection of his 1978 application in November, 1986, denominated as an application for a Reduced Pension, revived his cause of action challenging the earlier denial. The petitioner presented no new facts which would render him eligible for benefits under the terms of the applicable pre-ERISA Pension Plan. The petitioner does not dispute the finding by the Court of Appeals that he left covered employment permanently in September, 1971 (A-3). The November, 1978 letter properly informed the petitioner that he was ineligible for a Disability Pension, an Early Retirement Pension or a Partial Pension, as he had incurred a break in service, within the meaning of Article III, Section 5(b) of the Pension Plan, when he left covered employment permanently. According to Article III, Section 5(b) of the Pension Plan, an employee incurs a break in employment, resulting in the cancellation of his previously earned pension credits, when he fails to work at least 800 hours in covered employment or fails to have a certain amount of employer contributions paid on his behalf, during any period of two consecutive calendar years. The petitioner's accrued pension credits were cancelled pursuant to the above provision when he withdrew permanently from covered employment prior to attaining the minimum retirement age of 55 for an

Early Retirement Pension.[7] In his letter dated December 3, 1986, Sidney L. Meyer, Esq., the attorney for the Pension Fund, informed the petitioner that the Trustees had declined to reconsider his eligibility for benefits from the Pension Fund, as the November, 1978 conclusion that he had incurred a break in service when he withdrew permanently from covered employment " . . . was determinative of all pensions that Mr. Lamontagne was, or could have been, eligible for."

The result reached by the Trustees, which was upheld by both the District Court and the Court of Appeals, is not altered by the petitioner's assertion that his November, 1986 request for reconsideration by the Trustees included an application for a "grace period" pursuant to Article III, Section 5(c) of the Pension Plan. Firstly, the "grace period" could not have salvaged the pension credits which had been cancelled by the petitioner's break in service, as it is undisputed that he never returned to covered employment after September, 1971. Secondly, the earnings records from the Social Security Administration, which the Trustees reviewed prior to making their November, 1978 determination, indicated that the petitioner earned more than $1200 in the calendar years of 1973, 1974, 1975 and 1976. Accordingly, the petitioner was not totally and permanently disabled within the meaning of Article II, Section 10 of the Pension Plan during the calendar years immediately after he left covered employment, which would purportedly be included in the "grace period" he was requesting. Lastly, although the Plan allows the Trustees to extend the 12 month deadline for applying for the "grace period" if they " . . . find that extenuating circumstances prevented earlier application", the Trustees properly saw no justification for an extraordinary delay of six years in making such an application.

---

[7] The cancellation of the petitioner's pension credits pursuant to the break in employment provision also rendered the petitioner ineligible for a Disability Pension. He did not meet the requirements for "total and permanent disability" in Article II, Section 10 of the Pension Plan, as he earned more than $1200 in the calendar years of 1973, 1974, 1975 and 1976. Nor did the petitioner apply for and receive Social Security disability benefits during the period that he was allegedly disabled.

The Court of Appeals, likewise, properly rejected the petitioner's argument that the November, 1978 letter did not trigger the statute of limitations, as that denial violated the notice requirements of ERISA Section 503(1), 29 U.S.C. Section 1133(1). The Court of Appeals correctly concluded that the November, 1978 letter provided the petitioner with adequate notice setting forth the specific reasons for the denial of his application for pension benefits, so as to satisfy the requirements of ERISA Section 503(1)[8] (A-10-11). According to the petitioner, the major defect in the November, 1978 letter was the Trustees' failure to apprise him that he was entitled to a "grace period" due to his alleged disability. For the reasons discussed previously above, the "grace period" provisions of Article III, Section 5(C) of the Pension Plan are totally inapplicable to the petitioner under the circumstances at bar.[9]

Significantly, the November, 1978 letter clearly informed the petitioner that he had incurred a break in employment, resulting in the cancellation of his previously earned pension credits. As the Plan Administrator stated in the November, 1978 letter and as the attorney for the Pension Fund reiterated in December, 1986, the petitioner's lengthy break in service rendered him ineligible for all categories of pensions available under the applicable Pension Plan. The letter of November, 1978 enclosed a copy of the Pension Plan and apprised the petitioner of his

[8] A footnote in the certiorari petition refers to the petitioner's argument that the November, 1978 letter violated the notice requirements of Section 503(1) of ERISA and the Department of Labor regulations implementing that statutory provision (P-6-7). Page references preceded by "P" refer to the petition for certiorari.

[9] Assuming *arguendo* that the Court of Appeals had concluded that the November, 1978 letter violated the notice requirements of Section 503(1) of ERISA, this would not prevent said letter from triggering the statute of limitations on the petitioner's claim for benefits. *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed. 2d 588 (1986). The Courts have held that violations of ERISA's procedural requirements do not generally entitle an applicant to substantive relief, for example an award of pension benefits to which he would not otherwise be entitled. *See Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir 1985); *Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983).

right to appeal the denial of his application. The petitioner never pursued the Pension Fund's internal appeal procedure. Accordingly, the Pension Fund's denial of the petitioner's application for pension benefits in November, 1978 became final, for the purposes of the statute of limitations, when he failed to appeal that determination within the applicable time limits. *See Morgan v. Laborers Pension Trust Fund*, 433 F.Supp at 525.

The respondents raised the issue that the petitioner's ERISA claims were time-barred under the applicable statutes of limitations in the answer and in their memoranda of law submitted to the District Court in support of their motion for summary judgment. The ERISA statute of limitations issue was also mentioned in the respondents' brief submitted to the Court of Appeals. As was discussed above, the District Court and the Court of Appeals concluded that the petitioner's claims under the Taft-Hartley Act accrued in November, 1978, for the purposes of the statute of limitations. This conclusion applies with equal force to the petitioner's ERISA claims. Accordingly, if the petitioner had raised the issue of the timeliness of his ERISA claims in his petition for certiorari, this issue would have been appropriate for review by this Court. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98, 104 S.Ct. 2694, 2699, 81 L.Ed.2d 580, 587-88 (1984); *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 768 n. 17, 101 S.Ct. 1451, 1460, n.17, 67 L.Ed.2d 662, 663-64 n.17 (1981). Inasmuch as the petitioner has failed to request this Court to review the timeliness of his ERISA claims in his petition for certiorari, the findings of fact and conclusions of law by the District Court and the Court of Appeals relevant to this crucial dispositive issue would not be affected by this Court's determination on the sole issue presented in the certiorari petition. *See Helms v. Hewitt*, 712 F.2d 48, 49 (3rd Cir. 1983).

### B. The Petitioner is Ineligible for Benefits Under the Terms of the Applicable Pension Plan.

The District Court and the Court of Appeals both concluded that the petitioner was ineligible for benefits under the terms of

the applicable pre-ERISA Pension Plan (A-9, 30-31). Once again, the petitioner has failed to raise this dispositive issue in his petition for certiorari and, thus, the findings and conclusions of the Court of Appeals on said issue would stand unaffected by this Court's determination of the issue presented for review. *See Helms v. Hewitt*, 712 F.2d at 49.

The petitioner has failed to effectively challenge the conclusion of the Court of Appeals that he is ineligible under the terms of the Pension Plan, as his accrued pension credits were cancelled when he incurred a break in service upon his permanent withdrawal from covered employment. Accordingly, even assuming *arguendo* that this Court accepts this case for review and determines that the fiduciary provisions of ERISA are, indeed, applicable, a remand to the District Court for a determination as to whether the Trustees breached their fiduciary duties by denying the petitioner's application for pension benefits would be a waste of scarce judicial resources.

ERISA Section 203(b)(1)(F) explicitly permits the exclusion of any credit for years of service prior to the effective date of ERISA which could be excluded " . . . under the rules of the plan with regard to breaks in service, as in effect on the applicable date . . . " 29 U.S.C. Section 1053(b)(1)(F). Courts have repeatedly upheld the determinations by pension fund trustees that individuals forfeited their accumulated pension credits by the operation of pre-ERISA break in employment provisions, similar to Article III, Section 5 of the Pension Plan at bar. *See, e.g., Haeberle v. Board of Trustees of Buffalo Carpenters Health Care, Dental, Pension and Supplemental Funds*, 624 F.2d 1132 (2nd Cir. 1980); *Poggi v. New York Shipping Association-International Longshoremen's Association Pension Trust Fund*, 624 F.Supp. 983 (S.D.N.Y. 1985).

The petitioner relies upon a tortured, illogical manipulation of the break in employment and "grace period" provisions of the Pension Plan to bridge a period of over three years after he left covered employment permanently in September, 1971 before he attained the minimum retirement age of 55 for an Early Retirement Pension in January, 1975 (P-4 (footnote)). There can be no question that the Trustees' determination in November,

1978 denying the petitioner's application for pension benefits, based upon the break in employment provision in Article III, Section 5 of the Pension Plan, passes muster pursuant to the standards of review applicable to fiduciaries under ERISA. In *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___ , 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), this Court articulated the standards of judicial review for benefit determinations by fiduciaries or plan administrators in actions under ERISA Section 502(a) (1)(B). In determining the appropriate standards of review, this Court was guided by the principles of trust law, which are reflected in the provisions of ERISA. This Court concluded, "Consistent with established principles of trust law, we hold that a denial of benefits challenged under Section 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. at ___ , at 109 S.Ct. at 956, 103 L.Ed.2d at 95.

The Trustees' denial of the petitioner's application, however, will easily survive judicial scrutiny regardless of whether a *de novo* review is undertaken or a more deferential standard of review is utilized. The petitioner's permanent withdrawal from covered employment in September, 1971, several years prior to his attaining the minimum retirement age of 55 for an Early Retirement Pension,[10] rendered him ineligible for benefits under the terms of the Pension Plan. Numerous decisions have upheld determinations by pension plan fiduciaries and administrators declining to allow employees, like the petitioner, who left covered employment prior to attaining the minimum

[10] As was stated earlier, the petitioner's earnings from non-covered employment in the calendar years 1973-1976, after he left covered employment, rendered him ineligible for a Disability Pension under the terms of the plan. The petitioner's permanent withdrawal from covered employment prior to attaining age 55 would, likewise, render him ineligible for a Reduced Pension, for which he purportedly applied in 1986. In order to qualify for a Reduced Pension, an employee must retire after he has attained age 65. Article II, Section 13 of the Pension Plan defines retirement as " . . . complete withdrawal from any work in Covered Employment."

retirement age, additional time to "bridge" their years of service and render them eligible for early retirement benefits. *See Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988); *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988); *Gent v. Allied-Signal, Inc.*, No. 87-C-397-B (N.D. Okla. Dec. 9, 1987). *See also Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779 (9th Cir. 1988).

There is no language in Article III, Section 5 of the Pension Plan which allows the Trustees to grant an employee, who permanently withdraws from covered employment prior to attaining the minimum retirement age for pension benefits, several additional years to qualify for benefits, as the petitioner is advocating. The break in employment and "grace period" provisions of Article III, Section 5 allow an employee to avoid the cancellation of previously earned pension credits by returning to work in covered employment within a certain period of time. The petitioner, however, could not take advantage of either of the above two provisions, as it is undisputed that he never returned to covered employment after September, 1971. The Trustees' determination denying the petitioner's application for pension benefits was in accordance with the terms of the Pension Plan. Section 404(a)(1)(D) of ERISA requires a fiduciary to discharge his duties " . . . in accordance with the documents and instruments governing the plan . . . ". Adherence to the terms of the applicable Pension Plan, thus, is not a breach of fiduciary duty. *See Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989); *Hickman v. Tosco Corp.*, 840 F.2d at 566. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12, 101 S.Ct. 1895, 1900, 68 L.Ed.2d 402, 409-10 (1981), this Court emphasized that ERISA accords to private parties, like the Trustees at bar, the discretion to determine the method of calculating benefits and the amount of benefits. Accordingly, the federal courts cannot accept the petitioner's entreaties to rewrite the break in service provision in the Pension Plan in order to render him eligible for benefits.

The "grace period" provision of Article III, Section 5(c) of the Pension Plan, which allows an employee found to be totally disabled additional time to return to covered employ-

ment in order to avoid the cancellation of his accrued pension credits, is entirely a matter of discretion for the Trustees. There is no precedent or justification for the Trustees to grant the petitioner a "grace period" over eight years after his November, 1978 application for pension benefits and approximately fifteen years after he withdrew permanently from covered employment. As has been previously stated, the petitioner is clearly ineligible for the "grace period" under the terms of the Pension Plan, as he never returned to covered employment and his earnings as a machinist in non-covered employment prevented him from qualifying as totally and permanently disabled, within the meaning of Article II, Section 10 of the Pension Plan.[11]

In view of the petitioner's clear ineligibility for benefits under the terms of the Pension Plan, remanding this case to the District Court for a further review of the Trustees' denial of his application, if this Court determines that the fiduciary standards of ERISA are applicable, would be a "useless formality". *Ellenburg v. Brockway, Inc.*, 763 F.2d at 1096. Accordingly, this case is not appropriate for review and this Court should decline to grant the petition for certiorari.

## POINT III

### The Court of Appeals correctly construed and applied the exception to the preemption provision in Section 514(b)(1) of ERISA under the facts and circumstances at bar; the construction advocated by the petitioner would not alter the substantive result.

The sole issue presented for review by this Court in the petition for certiorari involves the construction of the exception to the preemption of state law by ERISA in Section 514(b)(1) of ERISA, 29 U.S.C. Section 1144(b)(1). This section provides that ERISA's preemption of state law " . . . shall not apply with

[11] The lapse of time since the petitioner's withdrawal from covered employment in 1971 will render it difficult, if not impossible, for the Trustees to obtain complete records and witnesses to verify his conclusory assertions that he was disabled at that time.

respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. Section 1144(b)(1).

The Court of Appeals affirmed the dismissal of the petitioner's claims under the fiduciary standards provisions of ERISA for lack of federal subject matter jurisdiction pursuant to Section 514(b)(1) of ERISA. The Court of Appeals concluded that the relevant "act", for the purposes of ERISA Section 514(b)(1), was the Pension Fund's adoption of the break in employment policy prior to the January 1, 1975 effective date of fiduciary standards provisions of ERISA (A-6). Citing with approval the decision of *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984), the Court of Appeals stated, "Here, as in *Menhorn*, the denial of the pension application followed inexorably from the pension fund's pre-1975 adoption of its break in employment policy." *Lamontagne v. Pension Plan of the United Wire, Metal and Machine Pension Fund*, 869 F.2d at 156. (A-7).

The petitioner advocates an alternative construction of Section 514(b)(1), whereby ERISA's fiduciary standards provisions would apply to all denials of pension benefits occurring on or after January 1, 1975. regardless of whether the denial was based upon the provisions of a pre-ERISA plan, as was the case at bar. The petition states that decisions from the Courts of Appeals for several circuits have concluded that the phrase "act or omission" in Section 514(b)(1) refers to the determination denying an application for pension benefits, while other circuits, including the Second Circuit in the instant case, have held that this phrase refers to critical acts or omissions upon which the denial was based.

Respondents respectfully submit that the issue framed by the petitioner is not appropriate for review by this Court, for several reasons. Firstly, the Court of Appeals correctly construed and applied Section 514(b)(1) of ERISA under the facts and circumstances at bar. Secondly, there are fundamental flaws in the case law and the reasoning supporting the petitioner's proposed alternative construction of Section 514(b)(1). Lastly,

even assuming *arguendo* that this Court adopts the petitioner's proposed construction, this would not alter the substantive result, as he is clearly ineligible for benefits under the terms of the applicable Pension Plan.

### A. The Court of Appeals Correctly Construed and Applied Section 514(b)(1) of ERISA.

The construction of Section 514(b)(1) employed by the Court of Appeals at bar has the practical impact of preventing " . . . past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent 'cause of action.'" *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981). *See also Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d at 1500. Other provisions of ERISA evince the intent of Congress to apply the provisions of that statute prospectively only. For example, the minimum vesting standards in Section 203 of ERISA explicitly give effect to break in service provisions in pre-ERISA pension plans, like Article III, Section 5 of the plan at bar, by allowing fiduciaries and administrators to disregard " . . . years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date . . . ". ERISA Section 203(b)(1)(F), 29 U.S.C. Section 1053(b)(1)(F). *See Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 145 (3rd Cir. 1985).

In the instant case, there can be no question that the petitioner's ineligibility for pension benefits is the inexorable consequence of the break in service rule in Article III, Section 5(b) of the Pension Plan, which resulted in the cancellation of his accrued pension credits when he withdrew permanently from covered employment. The cancellation of pension credits when a break in service occurs is essentially self-executing. The "grace period" provision of Article III, Section 5(c) was not raised when the petitioner applied for pension benefits in 1978.

For the reasons discussed extensively in Point II, *supra*, the "grace period" provision is clearly inapplicable under the circumstances at bar, as the petitioner never returned to covered employment and his earnings after leaving such employment prevented him from qualifying as disabled under the terms of the Pension Plan.

### B. The Case Law and Reasoning Supporting the Petitioner's Assertion that ERISA's Fiduciary Standards Apply to all Post-1975 Denials of Benefits are Flawed.

The petitioner cites decisions from the Third, Fourth and Fifth Circuits,[12] as well as the arguments in the brief submitted by the Department of Labor to the Eighth Circuit in *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979), in support of his proposed construction of Section 514(b)(1) of ERISA. According to the petitioner's reading of Section 514(b)(1), the fiduciary standards of ERISA apply to all denials of pension benefits occurring after January 1, 1975. The reasoning in several of the authorities cited by the petitioner, however, is flawed.

In *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d at 971, the Court of Appeals for the Fifth Circuit concluded that a construction of the term "act or omission" in Section 514(b)(1) of ERISA, creating an exception from the preemption of state law where a post-ERISA denial of benefits is based upon a pre-ERISA pension plan or other significant conduct, would, in effect, render the first exception, for "any cause of action which arose" prior to ERISA's effective date, superfluous. The Court of Appeals observed, " . . . (t)he cause-of-action exception would have independent significance only if it applies in contexts to which the act-or-omission exception is inapplicable." *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d at 971. Accordingly, the Fifth Circuit construed the term "act or omission" to refer to " . . . pension-related state

---

[12] *See Rodriguez v. MEBA Pension Trust*, 872 F.2d 69 (4th Cir. 1989); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989); *Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3rd Cir. 1985); *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d 966 (5th Cir. 1981).

administrative proceedings and criminal prosecutions, which certainly cannot be characterized as causes of action." *Woodfork*, 642 F.2d at 971. No other circuit has endorsed this construction of Section 514(b)(1) of ERISA.

The construction of ERISA Section 514(b)(1) in *Woodfork*, however, nullifies the "act or omission" exception. Under this construction, ERISA's fiduciary standards preempt state law unless the denial or benefits occurred prior to January 1, 1975. If the denial occurred after 1975, ERISA's fiduciary provisions would apply, despite the fact that the denial was based upon the unambiguous provisions of a pre-ERISA pension plan, like the break in service provision at bar. In effect, the accrual of the clause of action and the "act or omission" would both occur on the date the pension application was denied.

If, as the *Woodfork* decision posits, a statute should not be construed in such a way to render certain provisions superfluous (*See Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d at 970-71), the only construction which gives full effect to the "act or omission" exception in Section 514(b)(1) of ERISA is that employed by the Second Circuit in the instant case, which is in accord with decisions from the First, Seventh, Eighth and Ninth Circuits.[13] Under this construction, the fiduciary standards provisions of ERISA would not apply to denials of benefits occurring after January 1, 1975, which were based upon the clear, unambiguous provisions of a pre-ERISA pension plan, like the break in service provision in Article III, Section 5 of the Pension Plan at bar. *See Lamontagne v. United Wire, Metal and Machine Pension Fund*, 869 F.2d at 156; *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d at 1501-

[13] *See Smith v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of Southern California*, 857 F.2d 587 (9th Cir. 1988); *Lee v. Garrett Corp. Retirement Plan*, 803 F.2d 1082 (9th Cir. 1986); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070, 103 S. Ct. 1526, 75 L.Ed.2d 948 (1983); *Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888 (1st Cir. 1978).

1502; *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d at 894-95. This view is consistent with the Congressional intent to apply the standards for employee benefit plans set forth in ERISA prospectively only and to give effect to break in service provisions in pension plans adopted prior to ERISA's effective date. See ERISA Section 203(b)(1)(F), 29 U.S.C. Section 1053(b)(1)(F); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d at 1501; *Quinn v. Country Club Soda Co.*, 639 F.2d at 841.

In support of his proposed construction of Section 514(b)(1) of ERISA, the petitioner places significant emphasis on the views of the United States Department of Labor in its brief submitted to the Eighth Circuit in *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (See P-21-30). In this brief, the Department of Labor concluded that the applicability of ERISA's fiduciary standards depends upon the date of benefit denial, by reasoning that Congress intended the phrase "act or omission" to apply only to the conduct of fiduciaries and not to the conduct of participants and beneficiaries (P-21). This construction of Section 514(b)(1) does not compel a different result at bar. The Pension Fund's adoption of the applicable pre-ERISA Pension Plan, which the Court of Appeals held was the relevant act for the purposes of Section 514(b)(1), unquestionably constitutes conduct of fiduciaries to which the phrase "act or omission" applies, according to the Department of Labor brief. *See Lamontagne v. Pension Plan of the United Wire, Metal and Machine Pension Fund*, 869 F.2d at 156 (A-6-7); *Cowan v. Keystone Profit Sharing Fund*, 586 F.2d at 895.

### C. The Petitioner's Proposed Construction of Section 514 (b)(1) Does Not Alter the Substantive Result, as He is Ineligible for Benefits Under the Terms of the Pension Plan.

If this Court adopts the construction of Section 514(b)(1) proposed by the petitioner, this will not alter the substantive result at bar. The petitioner is clearly ineligible under the terms of the applicable Pension Plan. See Point II, *supra*. This Court recently reaffirmed the principle that federal courts reviewing determinations on applications for benefits by fiduciaries " . . .

are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S., at 56." *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. at ___, 109 S.Ct. at 954, 103 L.Ed. 2d at 92. It is axiomatic, however, that fiduciaries, like the Trustees at bar, must adhere to the terms of the applicable pension plan. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d at 1077-78.

In *Tanzillo v. Local 617, International Brotherhood of Teamsters*, 769 F.2d 140, one of the decisions cited by the petitioner in support of his proposed construction of Section 514(b)(1) of ERISA, the Third Circuit gave effect to a break in service provision in a pre-ERISA pension plan similar to Article III, Section 5 of the plan at bar. The Court of Appeals affirmed the order granting summary judgment in favor of the pension fund, where a pre-ERISA break in service rule applied to cancel some of the accrued pension credits the participant needed in order to qualify for benefits. *Cf. Degan v. Ford Motor Co.*, 869 F.2d 889 (Court of Appeals for the Fifth Circuit affirmed the order granting summary judgment and dismissing the complaint of a former employee claiming a right to early retirement benefits, based upon the pre-ERISA oral representations by his employer and union regarding the effect of drawing separation pay after his plant closed).

In view of the petitioner's ineligibility for benefits under the terms of the Pension Plan, review by this Court of the issue raised in the petition for certiorari will not alter the substantive result reached by the Court of Appeals, the dismissal of the petitioner's complaint.

## CONCLUSION

**For the above reasons, this Court should decline to grant the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.**

Dated: New York, New York
August 4, 1989

Respectfully submitted,

ARTHUR N. LAMBERT
*Attorney for Respondents*
LAMBERT & WEISS
61 Broadway, Suite 2020
New York, New York 10006
(212) 344-3100

ARTHUR N. LAMBERT
SUSAN E. JAFFEE
*Of Counsel*